Supreme Court, U.S.
FILED

(1)

No. 02-1445 MAR 28 2003

In The
Supreme Court of the United States

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE and DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Cross-Petitioners,

v.

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

CONDITIONAL CROSS-PETITION FOR CERTIORARI OF SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER

BLAINE J. BENARD
CAROLYN COX
Counsel of Record
HOLME ROBERTS & OWEN LLP
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 521-5800

Counsel for Cross-Petitioners San Juan Health Services District, Roger Atcitty, Karen Adams, Patsy Shumway, John Lewis, Reid Wood and Lauren Schafer

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

In No. 02-1253, petitioners Fred Riggs, Donna Singer and Al Dickson (cross-respondents and plaintiffs below), seek review of the following question: Whether the court of appeals erred in (i) affirming the district court's dismissal of petitioners' claim to enforce certain orders of the Navajo tribal court as against respondents Truck Insurance Exchange and Dennis Ickes and (ii) remanding petitioners' claim as against the Health District and San Juan County respondents for an analysis of subject matter jurisdiction pursuant to *Montana v. United States*, 450 U.S. 544 (1981)?

In this conditional cross-petition for a writ of certiorari, cross-petitioners San Juan Health Services District, Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer (respondents in No. 02-1253 and defendants below) seek review of the following question: Did the court of appeals err in reversing the district court's dismissal of the claims against cross-petitioners and holding that the Navajo tribal court's subject matter jurisdiction must be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in tribal court?

PARTIES TO THE PROCEEDINGS

Cross-Petitioners

Cross-petitioners San Juan County Health Services District (the "Health District"), Reid Wood, Karen Adams, Roger Atcitty, Patsy Shumway, John Lewis and Lauren Schafer are respondents in No. 02-1253, defendants below, and defendants in the action before the Navajo tribal court.

Cross-Respondents

Cross-respondents Fred Riggs, Donna Singer and Al Dickson are petitioners in No. 02-1253, plaintiffs below, and plaintiffs in the action before the Navajo tribal court.

Additional Parties in this Court

San Juan County, J. Tyron Lewis, Lyn Stevens, Manuel Morgan, Bill Redd, Rick Bailey, Craig Halls, (collectively "San Juan County defendants"), Truck Insurance Exchange ("Truck Insurance") and Dennis Ickes are respondents in No. 02-1253, defendants below, and defendants in the action before the Navajo tribal court.

Additional Parties Below

Dr. Steven MacArthur, Michele Lyman, Helen Valdez, Candace Laws, Paul Kieth, Dorothy Kieth, Baxter Benally, Percy Mitchell, Melvin Capitan, Candace Holiday, Eva Pleasant, Amy Terlaak and Linda Cacapardo were additional plaintiffs below but were not parties in the action before the Navajo tribal court.

PARTIES TO THE PROCEEDINGS – Continued

Cleal Bradford, John Housekeeper, Gary Holliday, Dr. James Redd, Dr. Val Jones, Dr. Manfred Nelson, Marilee Bailey, Ora Lee Black, Laurie Wallace, Carla Grimshaw, Gloria Yanito and Julie Bronson were additional defendants below but were not parties in the action before the Navajo tribal court.

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OPINIONS BLLOW

The December 28, 1999 preliminary injunction entered by the District Court of the Navajo Nation, Judicial District of Shiprock, New Mexico, is reprinted in the appendix to the petition for a writ of certiorari in No. 02-1253 ("P. App.") at 70a-104a. The Navajo tribal court entered three additional orders in furtherance of the December 28, 1999 preliminary injunction. These orders, dated March 1, 2000, March 2, 2000, and March 15, 2000, are reprinted in the appendix to the Petitioners' Brief in Opposition to Petition for a Writ of Certiorari in No. 02-1253 ("R. App.") at 1a-20a, 21a-22a and 23a-25a, respectively. In the action below, petitioners in No. 02-1253 sought enforcement of these orders entered by the Navajo tribal court.

The October 30, 2000 decision of the United States District Court for the District of Utah, Central Division, is unreported and is reprinted at P. App. 26a-51a. The October 30, 2000 order dismissed the action seeking enforcement of the Navajo tribal court orders with respect to cross-petitioners and the San Juan County defendants. The December 12, 2000 decision of the district court is unreported and is reprinted at P. App. 52a-69a. Pursuant to the December 12, 2000 order, the district court dismissed the action seeking enforcement of the Tribal court orders with respect to Dennis Ickes and Truck Insurance.

The October 7, 2002 decision of the United States Court of Appeals for the Tenth Circuit is reported at 309 F.3d 1216, and is reprinted at P. App. 1a-25a. On November 8, 2002, the court of appeals denied a petition for panel rehearing submitted by the cross-respondents as well as a

petition for rehearing en banc submitted by the cross-petitioners. The Order denying the petitions is reprinted at P. App. 105a-106a.

BASIS FOR JURISDICTION

The decision of the court of appeals was entered on October 7, 2002, and the court denied the petitions for panel rehearing and rehearing en banc on November 8, 2002. Singer, Riggs and Dickson filed a petition for a writ of certiorari in the United States Supreme Court on February 6, 2003, within ninety days of the denial of the petitions for rehearing. The petition was docketed as Case No. 02-1253 on February 26, 2003.

In reliance on Supreme Court Rule 12.5, this conditional cross-petition for a writ of certiorari is filed within thirty days from the date on which the petition for a writ of certiorari was docketed.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Utah Code Ann. § 63-30-2. Definitions.

As used in this chapter:

. . .

(3) "Governmental entity" means the state and its political subdivisions as defined in this chapter.

. . .

(7) "Political subdivision" means any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other governmental subdivision or public corporation.

. . .

Utah Code Ann. § 63-30-3. Immunity of governmental entities from suit.

(1) Except as may be otherwise provided in this chapter, all governmental entities are immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility, and from an approved medical, nursing, or other professional health care clinical training program conducted in either public or private facilities.

. . .

Utah Code Ann. § 63-30-4. Act provisions not construed as admission or denial of liability – Effect of waiver of immunity – Exclusive remedy – Joinder of employee – Limitations on personal liability.

. . .

(4) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee may be held personally liable for acts or omissions occurring during the performance of the employee's duties, within the scope of employment, or under color of authority,

unless it is established that the employee acted or failed to act due to fraud or malice.

STATEMENT OF THE CASE

The Health District is a special service district organized by San Juan County pursuant to Utah Code Ann. § 17A-2-1204. The individual cross-petitioners are employees of the Health District or members of its board of trustees. The individual San Juan County defendants are officials or employees of San Juan County.

The Health District operates a hospital in Monticello, Utah, as well as several out-patient clinics. Prior to January 1, 2000, the Health District operated an out-patient clinic located in Montezuma Creek, Utah. The Montezuma Creek Clinic is located within the exterior boundary of the Navajo Reservation on fee land held in trust by the State of Utah as part of the Utah Navajo Trust Fund. P. App. at 3a. The Health District provided medical services at the Clinic to Native Americans residing on the reservation pursuant to a contract with Indian Health Services, a federal government agency. Cross-respondents Fred Riggs, Donna Singer and Al Dickson were employed by the Health District at its Montezuma Creek Clinic. *Id.* In approximately November 1998, the Health District terminated Singer's employment, while Riggs and Dickson remained employed by the Health District at the Montezuma Creek Clinic until January 1, 2000, when it ceased operating the clinic.[1]

[1] Since January 1, 2000, the Montezuma Creek Clinic has been owned and operated by Utah Navajo Health Systems, Inc. ("UNHS"), an

(Continued on following page)

In April 1999, cross-respondents filed a Complaint for Damages in the Navajo tribal court, asserting numerous claims under federal and state law along with various Navajo law claims arising out of their employment with the Health District. P. App. at 4a, n.2. Cross-petitioners asserted both sovereign immunity and lack of jurisdiction as defenses to the Navajo tribal court Complaint. *Id.* at 30a.

Nevertheless, on December 28, 1999, the Navajo tribal court issued a preliminary injunction in which it ordered the Health District to reinstate Singer to her previous position and awarded back pay and attorneys' fees (an amount cross-respondents claimed was in excess of $500,000) to each of the cross-respondents. P. App. at 101a-104a. Despite the fact that the Health District owned and operated the Montezuma Creek Clinic, the preliminary injunction order also purported to preclude the Health District from "interfering" with the management of and numerous services provided at the Clinic and directed the Health District to take certain affirmative steps with respect to its operation of the Health District. *Id.* at 102a-104a. Moreover, although in their complaint cross-respondents sought relief only with respect to the employment actions allegedly taken against them by the Health District, the Navajo tribal court provided broad relief to members of the Navajo Tribe in general, including prohibiting the Health District from billing Navajo Tribe members for health care services, whether provided at the

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entity of which Singer is the executive director. Riggs, Singer and Dickson have all been employed by UNHS at the Montezuma Creek Clinic since January 1, 2000.

Montezuma Creek Clinic or at Health District facilities off the reservation. *Id.* at 103a. The order also precluded the Health District from eliminating emergency and other services on the reservation. *Id.*

In March 2000, the tribal court entered several orders supplementing the preliminary injunction, including the Order Denying Defendants' Motion to Dissolve or Modify the Preliminary Injunction Order dated March 1, 2000, R. App. at 1a; the Special Order in Aid to Satisfaction of Preliminary Injunction dated March 2, 2000, *id.* at 21a; and the Order Mandating that All Defendants' [sic] Be Bound by the Preliminary Injunction Order. *Id.* at 23a. Pursuant to these orders, the Navajo tribal court ordered cross-petitioners immediately to pay back wages and attorneys' fees, *id.* at 16a-17a; imposed a $10,000 per day penalty upon cross-petitioners in the event they failed to comply immediately with the Navajo tribal court's orders, $1,000 of which was to be paid by the individual cross-petitioners, *id.* at 20a; and ordered that the penalty would apply during any period of appeal. *Id.* The tribal court also purported to grant cross-respondents leave to seek immediate enforcement of its orders in any Utah or federal court. *Id.* at 22a. Finally, the Navajo tribal court permitted cross-respondents to add as defendants Truck Insurance, the Health District's insurer, and Dennis Ickes, counsel for cross-petitioners and the San Juan County defendants in Navajo tribal court, and the court bound both of them to its previously-entered orders. *Id.* at 24a-25a.

In August 2000, cross-respondents filed this action in the United States District Court for the District of Utah,

seeking to enforce the Navajo tribal court orders discussed above.[2] Shortly after the institution of this action, cross-petitioners moved to dismiss based on their sovereign immunity from suit in tribal court. By Order dated October 30, 2000, the district court dismissed cross-respondents' claim to enforce the Navajo tribal court orders with respect to cross-petitioners and the San Juan County defendants. P. App. at 26a. According to the court, as political subdivisions of the state of Utah and their officials and employees, cross-petitioners and the San Juan County defendants shared in the State's sovereign immunity from suit in the Navajo tribal court. *Id.* at 43a. On December 13, 2000, the district court entered an order dismissing the enforcement claim as against Truck Insurance and Ickes on the grounds the tribal court lacked subject matter jurisdiction over them. *Id.* at 52a.

Thereafter, cross-respondents sought and obtained certification of the October 30 and December 13, 2000 orders pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. On appeal, the United States Court of Appeals for the Tenth Circuit reversed the district court's ruling with respect to cross-petitioners and the San Juan County defendants. *MacArthur v. San Juan County*, 309 F.3d 1216 (10th Cir. 2002); P. App. at 2a. While the court of appeals acknowledged that cross-petitioners may have been entitled to sovereign immunity from suit in the Navajo

[2] In addition to the enforcement claim asserted by cross-respondents, the district court action named as plaintiffs a number of individuals other than cross-respondents. These additional plaintiffs asserted a broad range of federal civil rights and other claims against cross-petitioners as well as other defendants. The claims of these additional plaintiffs are not at issue before the Court.

tribal court, the court held that the district court should have addressed the issue of the tribal court's subject matter jurisdiction under *Montana v. United States*, 450 U.S. 544 (1981), prior to addressing the issue of sovereign immunity:

> The threshold question in our review of the Navajo court judgment is whether the Navajo Nation's decision to exercise adjudicative power over County and Health District defendants passes muster under *Montana*. If, and only if, appellants overcome the heavy presumption *Montana* establishes against the existence of tribal jurisdiction will a federal court have occasion to address the sovereign immunity issue at all.

Id. at 1226; P. App. at 22a. On this basis, the court remanded cross-respondents' enforcement claim to the district court for a determination of the tribal court's subject matter jurisdiction. *Id.* at 1228; P. App. at 25a. With respect to Truck Insurance and Ickes, the court of appeals affirmed the district court's dismissal, concluding that the Navajo tribal court lacked subject matter jurisdiction pursuant to *Montana*. *Id.* at 1223-24; P. App. at 14a-15a.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

The court of appeals reversed and remanded this case to the district court on the basis of its conclusion that the subject matter jurisdiction of the Navajo tribal court must

be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in tribal court.[3] Because this conclusion is erroneous and conflicts with the decisions of this Court and other courts of appeals, cross-petitioners ask the Court to grant a writ of certiorari on the cross-petition.

The court of appeals' conclusion rests on a brief passage in *Nevada v. Hicks*, 533 U.S. 353 (2001), in which this Court addressed a tribal court's jurisdiction over state law enforcement officers who entered tribal land to execute a search warrant against a tribe member. In *Hicks*, the Court rejected an assertion by the concurrence that claims of absolute and qualified immunity should be considered in addressing the jurisdiction of a tribal court:

> There are two problems with th[e] declaration [that claims of absolute and qualified immunity should be considered in addressing the tribal court's jurisdiction]. The first is that it is not true. There is no authority whatever for the proposition that absolute- and qualified-immunity defenses pertain to the court's jurisdiction – much less the tribe's *regulatory* jurisdiction, which is what is at issue here. . . . And the second problem is that without *first* determining whether the tribe has regulatory jurisdiction, it is impossible to know which "immunity defenses" the federal court is supposed to consider. The tribe's law on this subject need not be the same as the State's; indeed, the tribe may decide (as

[3] The court of appeals declined to review the district court's conclusion that cross-petitioners enjoyed sovereign immunity from suit in tribal court. *See MacArthur*, 309 F.3d at 1226; P. App. at 21a.

> did the common law until relatively recently) that there is no immunity defense whatever without a warrant.

Id. at 373-74 (emphasis in original) (internal citations omitted).

The court of appeals concluded that the above passage applies to the inherent sovereign immunity defense asserted by cross-petitioners, not just to the qualified and absolute immunity defenses at issue in *Hicks*. Based on this conclusion, the court of appeals held that subject matter jurisdiction and sovereign immunity are "distinct doctrines," that a determination of subject matter jurisdiction under *Montana* must precede the analysis of sovereign immunity, and that the district court erred by addressing sovereign immunity prior to the tribal court's subject matter jurisdiction. *See MacArthur*, 309 F.3d at 1227. The court of appeals' reading of *Hicks* is incorrect and fails to account for key differences between the qualified and absolute immunity defenses asserted in *Hicks* and the sovereign immunity defense asserted by cross-petitioners here.

Qualified and absolute immunity are defenses available to government officials that have arisen from the need of such officials to execute their duties without constant fear of liability. *See Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (stating that qualified immunity prevents "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service"); *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("[W]here an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without

fear of consequences.'" (citation omitted)). Specifically, absolute immunity protects government officials performing legislative, prosecutorial or judicial functions regardless of their fault or motive. *See generally id.* at 520-24. Qualified immunity protects government officials from liability so long as their "actions do not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* at 525. The defenses of absolute and qualified immunity do not challenge the court's authority based on the defendant's identity, but instead immunize officials based on the nature of their acts. *See id.* at 521 (explaining that Attorney General's entitlement to absolute immunity rests not on "his position within the Executive Branch, but on the *nature of the functions he was performing in this case*" (emphasis added)).

On the other hand, the inherent sovereign immunity asserted by cross-petitioners in this case "is a common law doctrine which precludes litigation against an unconsenting government." *Montana v. Gilham*, 932 F. Supp. 1215, 1219 (D. Mont. 1996) (citing RESTATEMENT (SECOND) OF TORTS § 895B (1979)), *aff'd*, 133 F.3d 1133 (9th Cir. 1998). Unlike qualified and absolute immunity, inherent sovereign immunity does not flow from the nature of the sovereign's acts. Rather, the assertion of sovereign immunity challenges the tribunal's power to hear the suit based upon the defendant's status as a sovereign.

Due to the nature of sovereign immunity, this Court and certain courts of appeals have repeatedly recognized that assertions of sovereign immunity are jurisdictional in nature and appropriately asserted at the jurisdictional stage. Although these cases do not involve the specific type of sovereign immunity asserted here, i.e., the common-law

inherent sovereign immunity of states and their political subdivisions from suit in tribal court, they are applicable because they involve similar challenges to a court's power or authority on the basis of sovereignty.

For example, this Court has acknowledged that assertions of sovereign immunity by the federal government are jurisdictional in nature:

> Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit. Sovereign immunity is jurisdictional in nature. Indeed the terms of [the United States'] consent to be sued in any court *define that court's jurisdiction to entertain the suit.*

FDIC v. Meyer, 510 U.S. 471, 475 (1994) (internal citations omitted) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)) (emphasis added); *see also United States v. White Mountain Apache Tribe*, 123 S. Ct. 1126, 1131 (2003) ("Jurisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity."); *Dahl v. United States*, 319 F.3d 1226, 1228 (10th Cir. 2003) (stating that the sovereign immunity of the federal government is "jurisdictional in nature").

Subject to certain exceptions, states enjoy sovereign immunity from suit in federal court pursuant to the Eleventh Amendment.[4] As with federal sovereign immunity, this

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[4] The Eleventh Amendment provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Here, cross-petitioners did not assert

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Court and other courts have treated assertions of Eleventh Amendment sovereign immunity as jurisdictional in nature that are appropriately raised at the jurisdictional stage. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 691 (1999) (concluding that federal courts are "without jurisdiction" to hear suit against arm of the State of Florida due to state's sovereign immunity); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), ("The test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one."); *Watters v. Washington Metro. Area Transit Auth.*, 295 F.3d 36, 39 n.2 (D.C. Cir. 2002), *cert. denied*, 2003 WL 1446751 (U.S. Mar. 24) (No. 02-1034) ("Sovereign immunity is a jurisdictional issue that may be raised at any time during the course of the litigation."); *In re Bliemeister*, 296 F.3d 858, 861 (9th Cir. 2002) ("Sovereign immunity [pursuant to the Eleventh Amendment] is quasi-jurisdictional in nature.").

Finally, courts have also treated assertions of sovereign immunity by foreign countries pursuant to the Foreign Sovereign Immunities Act ("FSIA") as imposing a jurisdictional bar. *See, e.g., Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983) (explaining that, if a foreign country is immune from suit under the FSIA, the court lacks jurisdiction over the action); *MCI Telecomm. Corp. v. Alhadhood*, 82 F.3d 658, 661 (5th Cir. 1996) (noting that immediate appeal from order denying sovereign immunity under the FSIA is permitted "because it raises the issue of the court's subject matter jurisdiction").

Eleventh Amendment immunity from suit in *federal* court, but rather common law sovereign immunity from suit in *tribal* court.

Here, cross-petitioners assert common law sovereign immunity from suit in tribal court rather than federal, Eleventh Amendment or foreign country sovereign immunity. However, as in the cases cited above, the sovereign immunity asserted by cross-petitioners challenges the Navajo tribal court's jurisdiction to hear the claims asserted against them on the basis of sovereignty. Accordingly, contrary to the conclusion of the court of appeals, the district court appropriately addressed cross-petitioners' assertion of common-law sovereign immunity prior to addressing the tribal court's subject matter jurisdiction under *Montana*.[5] This Court should therefore grant a writ of certiorari to review the court of appeals' decision.

II. THE ISSUE OF WHETHER A STATE AND ITS SUBDIVISIONS ARE IMMUNE FROM SUIT IN TRIBAL COURT ON THE BASIS OF SOVEREIGN IMMUNITY IS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The court of appeals declined to address the issue of sovereign immunity on the merits, concluding that the district court must first address the Navajo tribal court's subject matter jurisdiction. Certiorari should also be granted in this case because the issue of whether states, their political subdivisions, and officials and employees are

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[5] Even the court of appeals acknowledged the jurisdictional nature of sovereign immunity in this case, stating that, "[o]n a practical level, . . . both *Montana* and sovereign immunity may divest the Navajo court of the power to adjudicate the parties' suit." *MacArthur*, 309 F.3d at 1226; P. App. at 21a.

entitled to sovereign immunity from suit in tribal courts is an important federal question that has not been addressed by this Court.

A. The State of Utah Is Immune From Suit in the Navajo Tribal Court

As independent sovereigns, states enjoyed sovereign immunity before the Constitution was ratified, and "they retain [it] today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Sovereign immunity was and is such a fundamental aspect of a government's existence that "'the Constitution would never have been ratified if the states and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.'" *Id.* at 727 (quoting *Atascadero*, 473 U.S. at 239 n.2).

Accordingly, while the states relinquished some aspects of their sovereign immunity in joining the Union, they certainly did not relinquish all of it. As the Supreme Court has explained, the states surrendered their sovereignty only to the extent enumerated in the Constitution: "Unless, therefore, there is a surrender of this immunity in the plan of the convention it will remain with the States. . . ." *Monaco v. Mississippi*, 292 U.S. 313, 324 (1933) (quoting Federalist No. 81). As part of the constitutional plan, the states accepted a reciprocal relationship of rights and responsibilities through which the states gave up to the federal government some aspects of their sovereign immunity, in particular as to sister states and the

federal government. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 781-82 (1991). As the district court explained, "a state's implicit waiver of sovereign immunity as to suits by the United States or 'sister states' is predicated upon the 'mutuality of concession' inherent in the formation of the Union." P. App. at 41a; *see also Alden*, 527 U.S. at 749 (stating that "the immunity of one sovereign in the courts of another has often depended in part on comity or agreement").

However, the states maintained all other aspects of their sovereignty, including their sovereign immunity from suit in tribal court. *Montana v. Gilham*, 133 F.3d 1133, 1136-37 (9th Cir. 1998) (holding that the State of Montana had sovereign immunity from suit in tribal court); *see also Montana v. King*, 191 F.3d 1108, 1112 (9th Cir. 1999) ("Although the States surrendered some of their inherent sovereignty as a mutual concession to the other States, this surrender was limited to the other States and did not extend to Indian Tribes."); *cf. Blatchford*, 501 U.S. at 781-82 (indicating that states have sovereign immunity in federal court from suit by Indian tribes). In *Gilham*, the plaintiff sued the State of Montana in tribal court for injuries resulting from an auto accident involving a state highway sign, which occurred on a state highway within the exterior boundaries of the Blackfeet Indian Reservation. *See Gilham*, 133 F.3d at 1134. Although Montana asserted sovereign immunity from suit, the tribal court ultimately entered a judgment against the State. *Id.* Montana subsequently filed suit in federal district court, seeking a declaratory judgment that it was immune from suit in the tribal court. *Id.* at 1134-35. The United States District Court for the State of Montana granted the declaratory judgment, and the Ninth Circuit affirmed,

explaining that "tribal courts historically did not possess and have not retained sovereign powers over States" and that "the power to subject other sovereigns to suit in tribal court was simply not a part of the tribal court's inherent sovereignty." *Id.* at 1137-38. Because Montana had not waived its immunity from suit in tribal court, the Ninth Circuit held that the tribal court exceeded its jurisdiction in proceeding forward against a sovereign. *Id.*

Blatchford also supports cross-petitioners' sovereign immunity from suit in the Navajo tribal court. In *Blatchford*, an Indian tribe sued officers of the State of Alaska in federal court based on the State's decision to interpret a revenue-sharing statute written to apply only to "native village governments" as applicable to all unincorporated communities. *Blatchford*, 501 U.S. at 777-778. The State argued that it and its officials were immune from suit under the doctrine of sovereign immunity. *Id.* After noting that the "States entered the federal system with their sovereignty intact," the Court held that sovereign immunity precluded Indian tribes from suing states in federal court absent a state's consent. *Id.* at 782. The Court explicitly rejected the tribe's argument that states had waived their sovereign immunity from suit by Indian tribes by adopting the Constitution. *Id.*

The immunity from suit in state courts enjoyed by Indian tribes also supports the district court's determination that states retain sovereign immunity from suit in tribal court. *See, e.g., Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) (holding that an Indian tribe is not subject to suit in state court unless Congress has authorized the suit or the tribe has waived its immunity). As the Supreme Court stated in *Blatchford*:

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with either foreign sovereigns or Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suit by States, as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties. But if the convention could not surrender the tribes' immunity for the benefit of the States, we do not believe that it surrendered the States' immunity for the benefit of the tribes.

Blatchford, 501 U.S. at 782 (internal citation omitted).

In sum, the district court appropriately applied *Gilham*'s reasoning to this case and correctly held that states retained their common law sovereign immunity from suit in tribal court.

B. Cross-Petitioners Share in the State's Immunity from Suit

As a political subdivision of the State of Utah, the Health District shares in the State's sovereign immunity from suit in tribal court. The district court appropriately looked to state law to determine whether the State's sovereign immunity extended to the Health District and its officials and employees. *See Gilham*, 133 F.3d at 1138 (applying state law to determine whether Montana had waived its sovereign immunity from suit in tribal court); *see also In re Allied-Signal, Inc.*, 919 F.2d 277, 280 n.4 (5th Cir. 1990) (common law sovereign immunity is determined by state law); WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 3524 at 213-14 (1984) (same); *New York Life*

Ins. Co. v. Plaquemines Parish Comm'n Council, No. 91-0909, 1991 U.S. Dist. LEXIS 11534, at *3 (E.D. La. Aug. 13, 1991) ("[C]ommon law sovereign immunity . . . is created and determined under the laws of each State. . . . " (citing *In re Allied-Signal*, 919 F.2d at 280 n. 4)).

To determine whether the State of Utah wished to cloak its political subdivisions with its sovereign immunity, the district court first looked to the design of the Utah Governmental Immunity Act (the "Act"). Utah Code Ann. §§ 63-30-1 to 63-30-38. As the district court determined, the State shares its immunity under the Act with all "governmental entities," which is defined as the State and its political subdivisions. Utah Code Ann. §§ 63-30-2(3); 63-30-3. Similarly, the Act defines a "political subdivision" as "any county, city, town, . . . *special improvement or taxing district*, or other governmental subdivision or *public corporation*." Utah Code Ann. § 63-30-2(7) (emphasis added). The Health District, created as a special service district pursuant to Utah Code Ann. § 17A-2-1204, clearly falls within this language. *See Carter v. Milford Valley Mem'l Hosp.*, 996 P.2d 1076, 1079-1081 (Utah Ct. App. 2000) (holding that governmental immunity act applies to hospital owned and operated by special service district); *cf. Lyon v. Burton*, 5 P.3d 616, 621-23 (Utah 2000) (concluding that county fire district was entitled to immunity under the governmental immunity act);[6] Based on

[6] As further evidence that the State of Utah cloaks special service districts such as the Health District with its state sovereign immunity, the Act specifically provides that governmental entities are "immune from suit for any injury which results from the exercise of a governmental function, governmentally-owned hospital, nursing home, or other governmental health care facility. . . . " Utah Code Ann. § 63-30-3(1).

Utah's extension of its immunity under the Act to the Health District, Utah's cloak of common-law sovereign immunity clearly extends to the Health District.

That the district court correctly concluded that Utah's sovereign immunity from suit in tribal court extends to its political subdivisions is also demonstrated by the lack of any mutuality of concession between the states and Indian tribes with respect to their political subdivisions. Not only are tribes themselves immune from suit in state court, but their political subdivisions are also immune. *See Dixon v. Picopa Constr. Co.*, 772 P.2d 1104, 1108 (Ariz. 1989) (tribal immunity applies to subordinate governmental agency); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 656-657 (Ariz. 1971) (same); *see also Snowbird Constr. Co. v. United States*, 666 F. Supp. 1437, 1441 (D. Idaho 1987) (tribal sovereignty applies to tribal housing authority). Given that the tribes have maintained sovereign immunity for their subdivisions, there is no basis for concluding that the political subdivisions of a state are subject to suit in tribal court.

The individual Health District defendants are similarly immune. As the district court correctly found, pursuant to the Act, if the Health District enjoys immunity from suit, then its individual employees cannot be liable in their official capacity. P. App. at 48a. Because a suit against employees in their official capacities is simply another means of suing the entity, employees in their official capacities clearly share the sovereign immunity of the entity.

Moreover, the district court also found that, consistent with Utah Code Ann. § 63-30-4(4), which provides that an employee may not be held liable in his or her individual

capacity unless the employee "acted or failed to act due to fraud or malice," employees in their individual capacities should be able to share in the sovereign immunity of the governmental entity which they serve absent any allegation of fraud or malice. *Id.* Here, the tribal court's orders did not make any such findings against the individual cross-petitioners. *Id.* Thus, the district court correctly held that the Health District's employees and officers were likewise cloaked with the state's common law immunity from suit in tribal court.

CONCLUSION

If a writ of certiorari is granted in No. 02-1253, cross-petitioners respectfully request that this cross-petition also be granted due to the important issues presented herein.

Respectfully submitted,

BLAINE J. BENARD
CAROLYN COX
Counsel of Record
HOLME ROBERTS & OWEN, LLP
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 521-5800

Counsel for Cross-Petitioners San Juan Health Services District, Roger Atcitty, Karen Adams, Patsy Shumway, John Lewis, Reid Wood and Lauren Schafer

(2) (2)

Supreme Court, U.S.
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Nos. 02-1444; 02-1445

In the

Supreme Court of the United States

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, BILL REDD, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE AND DENNIS ICKES; and new district officers, NETTIE PRACK (official capacity only), GLEN IMEL (official capacity only), CLEAL BRADFORD (official capacity only), JOHN FELMETH (official capacity only) and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Cross-Petitioners,

v.

FRED RIGGS, DONNA SINGER and AL DICKSON,

Cross-Respondents.

ON CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CROSS-RESPONDENTS' BRIEF IN OPPOSITION

Susan Rose
Counsel of Record
9553 South Indian Ridge Drive
Sandy, UT 84092
(801)545-0441
Attorney for Cross-Respondents

W.M. P. Battles
Navajo Court Counsel
For the Cross-Respondents
Assisting on the brief

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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QUESTIONS PRESENTED

Docket No. 02-1444
San Juan County Cross- Petitioner's question:

Did the Tenth Circuit Court of Appeals err in remanding the case to District Court for a determination of tribal court jurisdiction despite the District Court's ruling that San Juan County, its county officials and county attorney, are immune from suit in Navajo Tribal Court under the doctrine of sovereign immunity?

Docket No. 02-1445
San Juan Health Services District's Cross-Petitioner's question:

Did the court of appeals err in reversing the district court's dismissal of the claims against cross-petitioners and holding that the Navajo Tribal court's subject matter jurisdiction must be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in Tribal court? **1**

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1 This Brief responds in opposition the cross petitioners briefs since they raise the same question of a political subdivision enjoying 'State' sovereign immunity, under the same factual circumstances, same procedural circumstances, and their question is essentially the same... Both questions are inherently flawed.

PARTIES TO THE PROCEEDINGS

All parties in the caption remain. Commissioner Bill Redd as captioned has left office, and is not longer a Commissioner, but remains a party in his personal capacity.

Under Federal Rules of Civil Procedure at Rule 25:

Nettie Prack, Cleal Bradford, John Felmeth, and Grant Imel are newly added San Juan Health District parties in their "official capacities only".

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STATEMENT

**The references herein to an appendix and lodging refer only to the Respondents original petition's , Petitioner's appendix (P. Ap.) and Petitioner's lodging (P. L.) as found in docket no. 02-1253, or the Respondents Petitioner's supplemental Appendix (P. S. Ap.) or Petitioner's Supplemental Lodging (P. S. L.) as attached to this Combined Brief in Opposition to the Cross-Petitioners Conditional Cross-Petition for a Writ of Certiorari.

Respondents strongly contest this Court hearing the petition of the quasi-municipal cross-petitioners' state sovereign immunity arguments, but the Respondents agree that remanding the case for subject matter jurisdiction of Tribal Court was inappropriate, based on the reasoning found in the original petition for a writ of certiorari found in docket no. 02-1253. Cross-Petitioners' immunity is about tribal law being extinct in the face of the alleged immunity of the lowest employee, of the lowest quasi municipal corporation, intentionally violating Tribal laws with impunity, due to the misty dreams of State sovereign immunity. With immunity, then Tribal law that is self-governance is *extinct*.

The Respondents initial petition for certiorari is about human life (P. Ap. 72a, 90a) an injunctive relief, a bona fide ***emergency***, **for ongoing harms** ,and diabetic and other patients being turned away from health care[1], violations of Congressionally-guaranteed Navajo

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1 See Affidavit of previous San Juan County Commissioner Mark Maryboy (P. S. L. 9-10); Affidavit of Edna Raulston as to the nature of diabetes. (P. S. L. 1-3); Affidavit of Donna Singer as to diabetic patients in the Montezuma Creek Clinic area still unaccounted for or now needing dialysis. (P. S. L. 5); Affidavit of Dr. Jane Shelby, as to findings of patients without medication, homebound, and not going to the Montezuma Creek Clinic locally, for medical necessities due to the belief they would have to pay $40 dollars. (P. L. 32-33). Cross-Petitioners intentional harms are a form of genocide. Id. 18 U.S.C 1091.

employment, civil rights, and due process in the Navajo Court, by way of the cross-petitioners' bad faith litigation involving San Juan County ('County') (Docket No. 02-1444) wrongdoers and San Juan Health Services District ('District')(Docket No. 02-1445) wrongdoers. (P. Ap. 95a-99a). Cross-Petitioners' Navajo law offenses occurred at (1) Montezuma Creek Clinic (MCC), Montezuma Creek, Utah within the Navajo Nation borders; (2) the Navajo Court in Shiprock, New Mexico; and (3) in hundreds of homes of Navajo reservation publicly and privately insured patients, covered by minimally Indian Health Service Insurance, who are not liable for payment of any charges or costs , who received Cross- Petitioner's bills that were often years old (P. S. L. 9-10), sent by defendants dissatisfied with non-payment from Indian Health Service or other 3rd party payors. **2**. I.H.S., contractors must timely file bills for patients, or payments can be rejected for the claims. **3**

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2 Cross-Petitioners do not dispute, the Cross-Petitioners during the time the initial Navajo Nation Court TRO was lifted, after May 14, 1999, began privately billing Navajo Indian Health Service patients living within the Navajo Nation borders with at times years worth of bills for medical care, and subjecting them to anglo Court actions, ruining their financial credit and driving these patients from their health care. P. Ap. 90a, P.L. 8,11. These harms occurred in hundreds of homes within the Navajo Nation.

3 Some District Bills came from off-reservation facilities, some came from clinics at Montezuma Creek and Monument Valley clinics within the reservation. *No evidence was produced in Navajo Court* that showed that after the District failed to renew the Hospital's contract, that the hospital so informed the I.H.S. non-emergent patients that their Indian Health insurance was no longer any good at that facility, or that the I.H.S. patients at the time of visit were provided a translator to read to them any forms, so they could understand that the Hospital did not take their I.H.S. insurance. All bills at all times from Montezuma Creek Clinic and Monument Valley would have been covered by I.H.S IF timely and properly filed with I.H.S. It is unjust to demand private payment for errors in billing the insurer or 3rd party,

By Public Law 102-572 sec. 222, these I.H.S., and publicly and privately insured patients had no liability for payment. **4**.

These patients were turned away by cross petitioners with full knowledge of the lethal disease processes **5** to which this aboriginal population was weak— **a most cowardly ambush using law as the weapon of choice**. They also understood the already harsh impediments for diabetes that include lack of transportation, lack of refrigeration and electricity for insulin preservation, lack of clean running water, lack of passable dirt roads, lack of employment and money for gas, and the distances of 65 to 100 miles on dangerous roads to get to the I.H.S. hospital in Shiprock if they thought they could not afford to go to Montezuma Creek or Monument Valley clinic for their health care. (P. S. L. 10, 5). They knew in November of 1999 that there had been

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that publicly insured patients have no control over or ability to fix. P. S. L. 9-10.

4 Public law 102-573, "Sec. 222 (a) A **Patient** who receives contract health care services that are authorized by the Service Unit CHS [Contract Health Services] **shall not be liable for payment of any charges or costs associated with the provision of such services**; (b) The Service Unit CHS shall notify a contract care provider and ay patient who receives contract health care services authorized by the Service Unit CHS that **such patient is not liable for the payment of any charges or costs associated with the provision of such services.**"

5 "Available Data indicate that age adjusted death rate among Native Americans for Type 2 diabetes is 2.7 times higher in Native American's than in the general population. Among the Pima Indians, who have been studied in detail by NIH since 1965, more than 50 percent of adults have Type 2 diabetes, and the death rates due to diabetes are over ten times those for Caucasians in the United States. Native Americans also have high rates of complications, including end stage renal failure and peripheral vascular disease with amputations." 1999 *Conquering Diabetes* National Institute of Health publication 99-4398 page 24-25. see also P. S. L. 1-3 for the Nature of the disease.

a 250% drop in just the diabetic patient visits to Montezuma Creek Clinic alone, (P. Ap. 90a) and kept billing anyway. (P. S. L. 5, 9-10).

The alleged District 'fact' that "...the Health District owned, and operated the Montezuma Creek Clinic...." Dist. Cross-Petition page 5, is in manifest error. The Tenth Circuit found, "The clinic and land upon which it is located was purchased by the State of Utah as part of the Navajo Trust Fund", 10th Cir. P. Ap. 3a. **Montezuma Creek Clinic was bought and paid for with Navajo money, from Navajo non-renewable oil and gas reserves within the Aneth area, for the benefit of the Navajo and Ute people, as mandated by Federal statute 47 Stat 1418 and strengthened by 82 Stat. 121. *United States v. Jim*, 409 U.S. 80, 81-82 (1972).**

But for, the I.H.S. contract, that is part of one of those programs that serve Navajos where entry is permitted under Article 1 of the Treaty, and to serve over 6000 Native Americans (P. S. L. 9-10, 19, and 20), the cross-petitioners would not have been in Indian Country at Montezuma Creek Clinic, advantaging themselves and taxpayers with profits from these thousands of contracts by medically serving Navajo people. **6** Numerous federal regulations constantly update these contracts to protect Indian patients. **7**

Cross-petitioners do not dispute that the Navajo Nation, equal with all other federally-funded territorial

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6 See *S.R.I. V. Pollaca*, SC-CV-86-98, Navajo Supreme Crt August 22, 2000. (P. L. 27).

7 42 CFR §§ 36.12(provides medical coverage to Indians within contract area); 36.13 (coverage to non contract providers if preauthorized or an emergency); 36.16(absence of a beneficiary card will not be grounds for denying services); 36.217 (no discriminatory practices among the people served including denial of services, or treating a patient differently than others [such as privately billing them if the District is the contractor]);36.352(fair and uniform services) and Title 48 and 50 as well.

and possession Courts, have subject matter jurisdiction to protect the vital and necessary attributes of Tribal sovereign governance; (1) human public safety, health and welfare**8**; (2) employment rights **9**; (3) inherent civil rights **10**; (4) Navajo customs and traditions **11**; (5) financial relations **12**; and (6) its own Tribal Court processes **13**

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8 "A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *See United States v. Montana*, 450 U.S. 544, 565 (1981).

9 "Indian tribes are neither states, nor part of the federal government, nor subdivisions of either. Rather, they are sovereign political entities possessed of sovereign authority not derived from the United States, which they predate. "

"Limitations on tribal self-government cannot be implied from a treaty or statute; they must be expressly stated or otherwise made clear from surrounding circumstances and legislative history." 692 F.2d at 712 (citing *Bryan v. Itasco County*, 426 U.S. 373 (1976)); and *Morton v. Mancari*, 417 U.S. 535 (1974))....

The tribe's sovereign status is directly related to its ability to generate revenues through the regulation of commercial activities on the reservation."

NLRB v. Pueblo of San Juan, ___ F.3d ___, 2002 WL 32718 (10th Cir. 2002).

10 *Santa Clara Pueblo v. Martinez* , 436 US 49 (1978) (exclusive jurisdiction over Indian Civil Rights Act and Tribal law claims)

11 Id. "The plaintiffs have a privilege and a duty under Navajo Custom and Tradition for Mrs. Singer in her tribal in-law status and Mr. Riggs and Mr. Dickson in their enrolled status, to look out for the welfare of their fellow Navajo "citizens"....The Navajo clan system, applicable to in-laws through their spouses , demonstrates the unique bonding of Navajo's to other tribal members or non-Tribal members as family, and the familial duties inherent to care for other members of the Tribal family...." P. Ap. 88a.

12 "Congress has also acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation. To assure adequate government of the Indian tribes, it enacted comprehensive statutes in 1834 regulating trade with Indians and organizing a Department of Indian Affairs. 4 Stat. 729, 735. Not

while enforcing Tribal laws for injuries occurring to anyone within the Navajo Nation reservation boundaries. (P. L . 59-60 [7 N.N. Code 204, 253]) . 25 U.S.C. 1302.

As to the legal basis for the Respondents Navajo Court claims, athorough reading of the Application for a Preliminary Injunction (P. S. Ap. 1a-21a) and the Complaint as modified (P. S. Ap. 22a-75a), (not at issue here), demonstrates **no** "42 U.S.C. 1983" claims, and any state claims would be outside the subject matter jurisdiction of the Navajo Court, though the Navajo Court may look to state law to understand why Navajo law was broken intentionally. The Respondents agree with the concurrence of Stevens and Breyer in *Nevada v. Hicks*, 533 U. S. 353 (2001), that unless Congress restricts the tribe from using federal law, the tribes in their inherent sovereignty can try people for federal law claims. So does

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satisfied solely with centralized government of Indians, it encouraged tribal governments and courts to become stronger and more highly organized. *See, e.g.*, the Wheeler-Howard Act, §§ 16, 17, 48 Stat. 987, 988, 25 U.S.C. §§ 476, 477." *Williams v. Lee*, 358 U.S. 217, 220 (1959).

Further, if any Indian claims a right to his own property the Petitioners have to prove he was personally responsible for the bill in Navajo Court. 25 U.S.C. §§ 194 (protection of Indians); 229(the Petitioners were to go to the tribe for compensation); 231 (says nothing about privately billing publicly insured Indians); 85 (off reservation contracts did not have the previous U.S. consent for on reservation residents); 1621a (federal government will pay health claims promptly).

13 "In LaPlante, the Supreme Court denied a non-Indian defendant insurance company a declaration that it had no duty to defend a suit by Indian plaintiffs seeking compensatory and punitive damages in tribal court. Id. at 11. The Supreme Court explained that although criminal jurisdiction of tribal courts was subject to substantial federal limitation, their civil jurisdiction was not similarly restricted. Id. at 15. " *Halwood v. Cowboy Auto Sales*, 946 P.2d 1088 (N.M. 1999), Docket No. 98-858. Petition for certiorari filed November 23, 1998. Petition for certiorari denied February 22, 1999.

the 10th circuit court, in this case, P. Ap. 11a. Tribes are part of the U. S. on land owned by the U. S., totally subject to the U. S. authority, funding, training, laws, and are fellow U. S. citizens, carrying out Federally scrutinized and approved Tribal laws by way of federal contracts. **14**

Even the 10th Amendment to the United States Constitution observes that powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people". Treaty authority is prohibited to the States under the Supremacy Clause, leaving 'the people' of the Navajo Nation to govern their Navajo territorial reservations without State sovereignty and immunity interfering and paralyzing Tribal governance.

I

RESTATEMENT OF THE CASE

Facts as to the Nature of the Cross-Petitioners

Cross-Petitioners do not dispute, and Cross-Petitioners can not debate, that for the time in question; (1) the Cross-Petitioner San Juan County (County) and County officials, sat on the Districts' board; (2) the Cross-Petitioner County Attorney Craig Halls gave the District and District CEO Rick Bailey advice contrary to Navajo and also State due process standards (P. Ap. D 79a) that violated Navajo due process standards; (3) County Administrative Assistant Rick Bailey was also the District's CEO (P. Ap. 79a); and (4) the County by statutes**15**

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14 Cross petitioners' immunity claims go to the ultimate issue raised by Chief Justice Robert Yazzi before the United State Senate Indian Affairs committee in the year 2002 pertaining to this Court's definitions of piecemeal Tribal Court jurisdictional authority over nonIndians and dependant on the parties land ownership and National origin of the parties. "In short, the Navajo Nation is faced with nothing less than the threat of cultural, economic, and political genocide. In the end, we are talking about territorial integrity. We are talking about the ability of Indian nations to have effective control over all activities within their boundaries for the common welfare." P. L. 40.

15 Utah code 17A-2-1313 and 1326(6), the County 'shall' control the

controls the District such that the County and District, for the times in question, were factually and legally one and the same.

Omissions and Errors

Omission: in the Statement of the Case, County Cross- Petitioners, page 5, fail to inform the Court that the Navajo Court lifted its TRO based upon their misrepresentations to the Navajo Court, as they later admitted to the Navajo Court, resulting in months of harm to Navajo patients, and Respondents, STILL ONGOING, of which the County defendants were aware and did nothing to stop. (P.S.L.- 5, 8,11). (P.L. 11)

The County Petitioners filed this Cross-Appeal petition, but wholly failed to timely file an opposition brief to the Respondents Petition docket no. 02-1253, or the Respondents *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 US 845 (1985) analysis of statutes, treaties, policies, or Article III subject matter jurisdiction limitations analysis to define Tribal Court jurisdiction in any manner different than as Congress by plenary power defines it by statutes and the executive branch carries them out. Presumably the County agrees with Respondents, except with immunity .

Error: The County petitioners in their conclusion, also use another slight of hand by claiming the Navajo Court is essentially forcing them to provide 'free' services to the reservation residents. The Navajo Nation sold land and sovereignty prepaying for those 'FREE' services. Mr. Riggs' uncle died in World War II for this Country and for the Navajo Nation and these services. I.H.S. Contractors ARE PAID, provided *the contractors providing the*

District, set the finances and tax rate for the District, appoint members of the District's governance board, and can withdraw any delegated authority to any appointed governance board member or employee at any time for any reason even to dissolving the governance board entirely.

services bill I.H. S., Medicaid, and private insurers correctly, and timely. Patients not liable for payment should not have to pay for mistakes and errors. **Indeed, it appears that now *I.H.S. has settled the unpaid claims* though cross-petitioners fail to inform any Federal Courts with this information.** (P. S. L. 5) Also, the County fails to inform this Court that the Federal government gives a payment in lieu of taxes of millions a year to the County in lieu of Navajo citizens paying property taxes, supposedly for County services. (P. S. L. 12) . They are rightfully fined. The longer the harms continue, the greater the price of the privilege of harming them. It is and always was within the power of the Cross-Petitioners to limit the Court fines by obeying them.

Neither is the Navajo Court paralyzing County or District government from pursuing the laudable goals of achieving the ends of justice by preventing Navajo patients from being killed by fear and ignorance of illegal anglo billing and court processes.. The harm to Cross Petitioners comes from their own recalcitrance and lack of common sense. If federal and state law had been adhered to, there probably would have been no Navajo law violations. Also, the Cross petitioners state that the company now running MCC is affiliated with the Tribe. Aside from MCC being a tribe recognized P.L. 638 non-profit, the Tribe does not immediately control MCC.

Full Due Process and Affirmatively Unchallenged Navajo Orders Exhaustion

Cross-Petitioners have not affirmatively challenged the Navajo rulings in the Navajo or lower Federal Courts below by their motions, so there are no remedies to be exhausted. Cross-Petitioners do not dispute, the Defendants were properly served, and after about 32 hours of hearings, about 14,000 pages of documents including all parties putting on evidence, making motions, producing live witnesses, WITHOUT LIMITATION of any kind by the

Navajo Court, and without any restrictions upon the parties to do, other than using a Navajo Court certified reporter, the Navajo Court issued its orders with scores of findings of fact and conclusions of law. (P. Ap. D 70a-104a, L-1-21). Nor do they deny that the claims were brought and litigated in good faith.

Cross-Petitioners do not dispute, the Navajo Nation; (1) is a civilized Nation and federally recognized Indian Tribe by way of the Treaty of 1868; (2) has a Navajo Nation Bill of Rights providing greater rights in its Navajo interpretation than the 1968 Indian Civil Rights Act demands; (3) has a three branch form of representative republic-type governance with an executive, legislative, and judicial branch of government; (4) Judges are independent of all political and external pressures; (5) has an appellate Navajo Supreme Court; (5) has a Navajo Judicial Conduct Commission and Judicial Code of Conduct if Judges violate Navajo law; (7) has a Navajo Bar Association requiring passage of an exacting examination; (8) courts are courts of record; (9) has jury trials very similar in format to Federal courts with Rules of Evidence and Jury selection processes. (P. L. 46-52) . Cross-Petitioners do not dispute, the Navajo Courts efficiently processes about 90,000 cases a year. P. L.- 47-50.

Cross-Petitioners do not dispute, the Cross-Petitioner parties at all times in Navajo Court; (1) were represented by Navajo bar counsel with about 30 years experience; (2) had no limits of any kind placed upon them to (a) make motions; (b) request hearings at a meaningful time and place; (c) certify questions to the Navajo Supreme Court; (d) file applications for special writs from the Navajo Supreme Court (P. L. 63); (e) file complaints with the Navajo judicial commission if the Navajo judge violated laws, rules, due process, Navajo customs and traditions, etc.; (f) hire a Navajo Court certified reporter (P. L. 3); (g) initiate settlement

discussions under Navajo Court rule 16 to expedite the litigation; (h) seek direct and immediate relief from the Navajo Court orders by motion in Federal District Court based upon bad faith claims, or lack of due process, or futility of appeal, AT ANY TIME, **if** these charges were well founded by the Navajo Court record, and *failed to do so*. ***Not one single document*** or ***even a quote*** *from a Navajo Court document has been produced at any time by the Navajo Defendants to contradict the fact that Cross-Petitioners had full due process, an opportunity for relief, in Navajo and lower Federal Courts and did not avail themselves of it until these cross-petitions. Even the Court fines for bad faith litigation were for acts in the Courts presence requiring no hearing under United States Supreme Court law, and were totally under the control of the cross-petitioners and their wealthy insurance carriers to stop at all times. Such fines were sensible in light of the harm to public safety. Defendants did not so advantage themselves.* ***16*** *Now they are claiming they are allegedly immune, conceivably also for anyone who has died or will die prematurely due to not*

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16 " To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law and the punishment imposed is due process of law." *Cooke v. United States*, 267 U.S. 517, 535, 534 (1925). The acts of falsely informing the Navajo Court in Court, that the cross-Petitioners did not shut down ambulances, pharmacies, lab services, and the filing of the false counter claims of fraud and theft and the like against Respondent Singer, repeated misrepresentations of fact and law, taking testimony as to intimidation and tampering with witnesses, obstructing testimony, and sandbagging evidence are ail actions occurring in or being testified to in the presence of the Court.

going to the clinic for essential care, medicines, and the like, because they believed they had to pay at the time of service. (P. L. 33, P. S. L. 5, 9-10).

Cross-Petitioners do not dispute, the Executive agency of the Bureau of Indian Affairs, Department of Interior, has taken formal agency action and contracted with the Navajo Nation judicial program directly to carry out *Navajo law* including Navajo definitions of jurisdiction, within the Navajo Nation, under the Indian Self-Determination Act, 25 U.S.C. § 450. (P.L. 55-59 and P. S. L. 30-40) Executive action is a test demanded by the 10th circuit of jurisdiction required by this Court under **National Farmer's** Union Insurance Co. v. **Crow Tribe**, 471 US 845, 855-56 (1985) (P. Ap. 25a). Nothing in 18 U.S.C. 1151 or the BIA contract with the Navajo judicial program diminishes Tribal jurisdiction within their borders by the national origin or ethnicity or land ownership of the parties or where the action occurred, not even for State violations of Treaty and Tribal laws within the borders.

The decision of an administrative agency is to be upheld unless it is found to be "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 [1 ELR 20110] (1971); *Appalachian Power Company v. EPA*, 477 F.2d 495 [3 ELR 20310] (4th Cir. 1973). In addition the courts will accord great deference to an agency's interpretation of its own regulations. *Udall v. Tallman*, 380 U.S. 1 (1965). Agencies find no immunity or State inherent sovereign powers to have dominion over Tribal Courts and Tribal laws.

Failure to Move Lower Courts for Relief

Cross-Petitioners do not dispute, the Cross-Petitioners have failed to affirmatively seek Federal Court jurisdiction, supposedly not to waive any alleged 'state' sovereign immunity, to file any motions for dismissal of

the Cross-Petitioners enforcement action in the lower federal court or even in Navajo Court by way of applying for special writs or certified questions to the Navajo Court. If they did not affirmatively seek relief below, they should not be allowed to do so now. **17**

Current Harms to Montezuma Creek Clinic Patients

Respondents can now identify about 50 or so diabetic patients still living within the MCC Indian Health Service contract area that are still not being seen anywhere for their diabetes after being identified in 1998. (P. S. L. 5). Many others, we believe, are going to Shiprock, about 65 to 100 miles away, for regular care, the precise amount is unknown and how regular the care is unknown. And 50 more are now needing dialysis regularly in Shiprock. What Respondents do not know is how many people are not coming in for regular health checks to be checked for diabetes and other diseases or how many people have died in the last three years from not going to the MCC for fear of billing and court processes, or thinking they had to pay to be seen. (P. L. 5).

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17 These Cross-Petitioners filed counterclaims of fraud, theft, and the like, and raised the defense of State sovereign immunity. These cross-petitioners are decidedly unlike New Mexico in Apache Tribe of the Mescalero v. New Mexico, No. Civ. 92-0076 JC/WWD (D.N.M. June 6, 1996) wherein the New Mexico state's counterclaim of state sovereign immunity was compulsory, and no Tribal law violations were raised. The Navajo common law tort claims of fraud, theft and the like are not compulsory and go beyond just a mandatory defense (for which they have no entitlement) to actually litigating their counterclaims with unlimited evidence and live witnesses in full hearings before the Navajo Court trier of fact seeking a decision on Navajo law violations in their favor.

REASONS FOR DENYING THE CROSS-PETITIONS

I

THE PETITIONERS' QUESTIONS ARE INHERENTLY FLAWED AND RAISE NO QUESTIONS OF NATIONAL IMPORTANCE OR CONFLICTS WITH THIS COURT OR OTHER CIRCUITS

Both cross- petitions' questions are inherently flawed in four ways: **(A)** the subject of State immunity and state immunity statutes being superior to Tribal law was addressed by the Tenth Circuit Court and does not need to be revisited in any Court; **(B)** the issue of a County violating Federal law or Federal legal protections of Tribes is moot based on (i) a March 10, 2003 decision of this Court, and (ii) Article VI of the United States Constitution; **(C)** the cross-petitioners fail to boldly state that they waived any 'state' immunity if it did exist, by voluntarily filed counterclaims of civil fraud, theft, and the like against Respondent Singer thus seeking the Navajo Court's jurisdiction **18** ; and **(D)** the Petitions do not represent San Juan County and San Juan District as constituent organizations, only the officials and employees who failed to allow the corporate bodies to have independent counsel as required under Utah Rules of Professional Conduct, and have held the litigation hostage from the control of the governing bodies themselves.

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18 Undisputedly, this waiver of immunity argument was raised on appeal by the Respondents and never addressed by the Tenth Circuit Court in its opinion.

A.
STATE IMMUNITY FOR QUASI-MUNICIPAL CORPORATIONS HAS BEEN DECIDED AND DOES NOT CONFLICT WITH ANY OPINIONS OF THIS COURT OR OTHER CIRCUITS

The Tenth Circuit Court clearly ruled, "Contrary to the County defendants' assertion on appeal...tribes are not subordinate to the states, *see Washington v. Confederated Tribes*, 447 U.S. 134, 154 (1980), and certainly not to counties. We must reject County Appellees' assertion "that the natural dominion of States and their political subdivisions over tribal governments was clearly established before the Untied States Constitution came into being and that there has been nothing post Constitution to change that fact". P. Ap. 11a. On remand, no inherent state immunity argument remained .

The County Attorney, quoting *Nevada v. Hicks*, 533 U. S. 353, 364 (2001), claims immunity from Tribal Court jurisdiction by citing "state officials... are properly held accountable for misconduct and civil rights violations in either State or Federal Court, but not in Tribal Court." County Cross petition pg. **14**. Here is how the entire quotation reads "State officials **operating on a reservation to investigate off-reservation violations of state law** are properly held accountable for tortuous conduct and civil rights violations in either state or federal court, but not in tribal court. " *Id.* *Hicks*, was not addressing Navajo Nation Bill of Rights or Indian Civil Rights Act, 25 U.S.C. 1302 violations as found by the Navajo Court. (P. Ap. D page 88a). Mr. Halls and all the other County Petitioners *were not* 'investigating off-reservation violations of state law." **19** If these

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19 As for Craig Halls, County Attorney cross-Petitioner, he fails to

government officials, are indeed the State, then *where are they to be held accountable for intentional violations of Navajo law?* Just exactly within what court will they be held accountable for Tribal law violations?

Arguably, no State court can try an official for Treaty violations if the crime or civil action of tribal law violations is not covered by Utah statute and the common law for Tribes is Federal. *United States v. Enas*, 255 F.3d 662 (9th Cir. En banc unanimous) cert denied, 534 U. S. 115 (2002). No Federal Courts can hear Tribal law violations, and Indian Civil Rights violations, under *Santa Clara Pueblo v. Julia Martinez* ,436 US 49 (1978), and 25 U.S.C. 1303. If a State or County official is to be held accountable for Indian Tribal law violations it has to be in Tribal Court. *Id.* Congress has not immunized them by silence. Thus, if this Court finds Mr. Halls and the Cross-Petitioners immune, then this Court will have made illegal activities magically legal, as long as the illegal activities are within Indian reservations, and only injure Indians. ... an outlandish outcome most certainly the opposite of that result intended by Congress' intricate scheme of

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inform the Court that in this case, he (1) is an attorney associated with the Utah bar not the Navajo bar; (2) was acting in a civil, not criminal, capacity, *outside* the statutory parameters of State law for his office; (3)was found, with the other cross-petitioners, to be unethically, intentionally violating the powers, authorities, rules and decorum of a Navajo Court, as guaranteed by, authorized and assented to, and protected by a Treaty, the Supreme law of the land, and numerous Congressional mandates thereto; (4)was filing claims against Respondent Singer that were an absolute lie, and unsupported by one piece of evidence showing fraud (P. ap. 85a), and participating in other forms of bad faith litigation; (5) is now saying his acts are okay because he is immune because he was acting in his capacity as a 'state' officer.

He produces no case law whatsoever to show any state attorney is immune as a 'state' officer for 'civil' law claims. None exists or he would have.

Tribal self-determination. "An injunction to prevent him [government officials] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Ex Parte Young*, 209 U.S. 123, 160 (1909) (a State can not authorize an official to violate the law). **20**

There is **not one** Federal, State, or Navajo source of law to support the cross-petitioner's position of a political subdivision or County Attorney enjoying State immunity, that is on point for Treaty and Tribal law violations. *Nevada v. Hicks*, 533 U. S. 353,(2001) explicitly stated that "There is *no authority whatsoever* for the proposition that absolute-and qualified immunity defenses pertain to the court's jurisdiction- much less to the tribe's regulatory jurisdiction, which is what is at issue here." Id. at 373-74. There is not one case where a county or district has been cloaked with state immunity when violating federal laws (*Cook, infra*) much less violating treaty provisions and the Federally protective laws thereto, the Supreme Law of the Land, or Navajo law. **None.**

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20. "But until Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler*, 435 U.S. 313, 323 (1978). Until Congress makes renegade quasi municipal corporations immune from Navajo tribunals for Navajo law violations, while voluntarily submitting to the Navajo Court by filing counterclaims therein, the Tribal orders involving Navajo law should be carried out.

B.

THE CROSS-PETITION ISSUE OF STATE SOVEREIGN IMMUNITY IS MOOT AND THIS COURT SUPPORTS THE TENTH CIRCUIT RULING AND *HICKS*

i

Cook County v. U. S. ex rel Chandler and Jenks v. Richland County , South Carolina

The Cross-Petitioners' question presupposes that the issue of state immunity for political subdivisions violating Federal, State, and Navajo law is still viable. Without question Congress has erected a plethora of statutes preserving Tribal Court jurisdiction over non-Indians and Indians alike. 25 U.S.C. §§ 450, 450, 1301, 1302, 1302, 3601, 3602, 3631, 3651, 3663. Further, all Tribal Courts must apply the protections of their Tribe's laws in a fair and uniform manner under Congress' mandates equally to all people within the boundaries of the Tribe, without distinctions of land ownership, national origin or any other distinguishing characteristics. 25 U. S.C. 1302 and by BIA contract P. S. L. 32.

The Petitioners' Cross-Petition was filed after March 10, 2003. The Cross-Petitioners failed to address this Court's *unanimous* ruling in *Cook County v. United States ex rel Chandler*, 538 U. S. ____ (March 10, 2003 docket no. 01-1572, slip opinion). This Court "conclud[ed], **"automatically and without discussion"** that municipal corporations, like private ones, should be treated as natural persons for virtually **all** purposes of constitutional and statutory analysis. " Citations omitted. *Id.* at page 7. Emphasis added. This Court went on to say "It is simply not plausible that Congress intended to repeal municipal liability *sub silentio* by the very Act it passed to strengthen the Government's hand ...." Id. at page 13. Neither here can one presume that "Congress intended to repeal municipal liability *sub silentio* by the very Act[s] it

passed to strengthen the [Tribal Court's] hand." The Cross – Petitioners fail to inform this Court that even Utah recognizes that these political subdivisions are not the 'state'. *See, Lyon v. Burton*, 2000 UT 19, ¶80, Utah Supreme Court**21**.

In the lower federal court, Cross-petitioners argued that state immunity laws demanded political subdivisions be sued only in State court not a federally-protected Navajo Court. This Court in *Hicks* said notions of qualified and absolute immunity do not apply to Tribal Court jurisdiction. *Hicks*, 373-374. P. Ap. 23a. On April 22, 2003 this Court also addressed both issues in the federal context.

> "....[A] State's authority to set the conditions upon which its political subdivisions are subject to suit in its own courts ***must yield to the enactments of Congress***. This is not an encroachment on State sovereignty, but merely the consequence of those cases (which respondent does not ask us to overrule) which hold that municipalities, *unlike States*, do not enjoy a constitutionally protected immunity from suit. ..... [T]he idea that an unmistakably clear statement is required before an Act of Congress may expose a *local* government to liability cannot possibly be reconciled with our holding in *Monell* v. N*ew York City Dept. of Social Servs.*, 436 U. S. 658 (1978), that municipalities are subject to suit as persons under 1983." Emphasis Added.

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21 Cross-Petitioners would have this Court presume they were the state by using 'state' immunity and 'state' tribal jurisdictional law. But they cite no law to support *the presumption* they are the 'state'. None exists. A deft slight of hand.

Jinks v. Richland County, South Carolina, 538 U.S. ____(April 22, 2003) page 8-10.

Using the reasoning of this Court in *Jenks*, Congress has the authority to make all Laws which shall be necessary and proper for carrying into Execution [Congress' Article I, §8] Powers and all other Powers vested by this Constitution in the Government of the United States...."Art. I, §8, cl. 18. Id. at 4. Here, Congress has enacted numerous statutes upholding, protecting, funding, and authorizing the Navajo Nation to create their Courts and to exercise their sovereign jurisdiction over Indians and non-Indians alike, under the Treaty of 1868 and laws made thereto, without restraint by state laws or political subdivision immunity, particularly when as here, they voluntarily counterclaimed in Navajo Court. (P. L. 10) **22** State immunity is moot.

ii

State Sovereign Immunity for Treaty Violations Was Made Moot in 1787

Historically, the Articles of Confederation, ratified in 1781, Article VI and IX, had provisions for states to act independently from all the 'united' confederation of States. The **Constitution of 1787** *permanently* changed this.

> "Not a single Indian war has yet been occasioned by aggressions of the present federal government, feeble as it is; but there are *several instances of Indian hostilities* having been provoked by the improper conduct of individual States, *who, either unable or unwilling to restrain or punish offenses*, have given occasion to the slaughter of many innocent inhabitants."

Federalist Papers No. 3

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22 25 u.s.c. 3601, 3602, 3631, 3651, 3663 among others.

Things haven't changed much. See P. S. L. 1-10. In 1787, States gave up sovereignty for mutual Supremacy Clause goals in Indian relations.

> "This Constitution, and the **Laws of the United States which shall be made in Pursuance thereof**; and **all** Treaties made, or which shall be made, under the Authority of the United States, shall be the **supreme** Law of the Land; and the **Judges** in every State **shall be bound thereby**, any Thing in the Constitution or Laws of **any state to the Contrary notwithstanding**. "

ArticleVI, United States Constitution ratified1787. **Nothing, including immunity,** is supreme over Treaties and Congress' laws made in pursuant thereto. Cross-petitioners do not dispute, that here the Respondents have all the protections of the Treaty of 1868, fully ratified by Congress, and neither does Utah state. **23** To give the Petitioners State Law immunity, would essentially replace the current Article VI of the U. S. Constitution with the Articles of Confederation and state supremacy.... an authority this Court can not possess. Textually, Article VI is all inclusive, clear and easy to understand, and Utah agreed to it when it joined the United States in 1894 in its enabling act **24**. Even the Utah Code 9-9-209 states, "*Any*

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23 25 U.S.C. §§ 450 (self determination act); 450(e) (Indian Preference in Employment Act); 1301-1303 (Indian Civil Rights Act providing the protection of Indian laws for all people); 25 U.S.C. 3601,3602, 3631, 3651, 3663 (tribal support acts), among many others.

24 "That the people inhabiting said proposed State do agree and declare that they **forever** disclaim all right and title .....to **all** lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same **shall be** and remain subject to the disposition of the United States, and said Indian lands shall remain under the **absolute** jurisdiction and control of the **Congress** of the United

tribal ordinance or custom ... shall, if not inconsistent with any applicable civil law of the state, be given full force and effect in the determination of civil causes of action." **25** Navajo Orders telling political subdivisions to stop harming Navajo people does not violate Utah law.

See, *State of Missouri v. Holland*, 252 U.S. 346, 347-349 (1920) ("If the treaty be valid there can be no doubt as to the validity of the law, under Article I sec. 8 of the Constitution, as a necessary and proper means of executing the powers of government..... The Treaty in question does not contravene any prohibitory words found in the constitution."). If they had any immunity, it was moot, and if not moot, waived just as the other parties and any other natural person, or as an alleged state officer waived immunity for the State in *Sutton*, here by filing Navajo counterclaims. *Cook, supra. Sutton, infra. No other Courts show otherwise.*

States;" Utah Enabling Act Section 3 second paragraph. Emphasis added.

25 Petitioners site to no Utah law that is violated by the Navajo Orders, since even the Utah Governmental Immunity Act waives immunity for contracts. Utah Code 63-30-5. Here we have an I.H.S. contract, thousands of patients' contracts, and agreements to adhere to the Navajo Preference in Employment Acts contained in all I.H.S. contracts, and the contract with the Navajo Court by paying the filing fee to obligate the Navajo Court to hear their claims. 48 CFR 352.270-2, 352.270-3. But for the I.H.S. contract, individual contracts, and court contract, these Petitioners would not be within the Navajo Nation borders. P. L. 22-31 *S.R.I. v. Pollaca*, SC-CV-86-98, August 22, 2000.

C

THE ISSUE OF STATE IMMUNITY WAS WAIVED AND THIS ARGUMENT HAS NO CONFLICTING RULINGS WITHIN CIRCUITS OR WITH THIS COURT AND IS NOT A QUESTION OF NATIONAL IMPORTANCE

Respondents raised this issue of waiver in the Tenth Circuit Court, but the Tenth Circuit Court did not acknowledge their argument. The cross-petitioners questions on their face, presuppose that any alleged immunity has not been waived. This is an inherent flaw also. The Cross-Petitioners fail to boldly proclaim to this Court that the Cross-Petitioners actively SOUGHT Navajo Nation Court protections for their bogus and totally unfounded counter-claims of fraud, theft, etc. against Respondent Singer, that were found to be without one piece of credible evidence in support thereof **26.** P. L. 10. Further, the false Navajo counterclaims were raised so as to have a trial by tabloid. P. Ap. 82a, 97a.. "The [Navajo] Court has jurisdiction over the defendants partly because they are the named parties who have committed acts within the Navajo Nation territorial boundaries, and as well because the defendants became plaintiffs *by filing their counterclaims*.... [T]he Court also has jurisdiction over the defendants because, even if, the defendants are an 'arm of the state', (which they have not shown any evidence to support), the defendants waived any rights of immunity when they filed counterclaims and fully participated in the Court proceedings." Id. P. L. 10.

The Tenth Circuit opinion citing to *Nevada v. Hicks*, 533 U. S. 353,(2001) says that "If they [immunity defenses] did pertain to the court's jurisdiction, they

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26 "That Lauren Schafer [chief administrator] testified that after a "scrupulous examination" of Singer's records for over nine months, Ms. Schafer had not discovered one piece of evidence as to Ms. Singer's intent to commit fraud." P. Ap. 85a.

would presumably be nonwaivable. *Cf. Idaho v. Couer d'Alene Tribe of Idaho*, 521 U. S. 261, 267 (1997)" *The Couer d'Alene Tribe of Idaho* decision clearly states on page 267 "Rather, a State *can* waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it.." *Id.* The County cross-petition also cites to *Sutton v. School for the Deaf and Blind*, 173 F.3d 1226, 1233 (10th Cir. 1999) again clinging to the vaporous cloak of State immunity. **27** Yet, *Sutton*, explicitly found that the State with competent legal representation waived immunity when seeking Federal Court jurisdiction. The same applies here, even more strongly, when an alleged state officer, Mr. Halls, petitioning the Navajo Court jurisdiction. Immunity doesn't apply here for cross-petitioners that are not, an 'arm of the state' as long as they can sue and be sued, as any other 'natural' person, and the State fisc is not at risk in the suit..**28** *Cook*, *Jenks*, *supra.* Respondents agree Utah Title 17 is separate and distinct from 17A, but the County 'shall' control the Distict , 17A-2-1326, set and collect its taxes, and fund, and make appointments at will. **29**

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27 While the County and District do not say they are an 'arm of the state' as defined in *Sutton*, they use State 'arm of the state' immunity cases to have this Court *presume* they are so, by a deft slight of hand.

28 Utah Code 17-50-302(2)(a); 17A-2-1314(1)(a).

29 There are no circuit court or Supreme Court rulings or even Utah state laws prohibiting political subdivisions or officials individually, or personally, from seeking the protections of the Tribal Courts for Tribal law damages for which they believe they are entitled to redress, as here. None. *The filing of their Navajo counter claims was their acknowledgement that the Navajo Court had jurisdiction over Montezuma Creek Clinic where the alleged fraud of Respondent Singer is supposed to have occurred.* Only when they got an unfavorable ruling, did the Cross-Petitioners ignore the Navajo Court. Undoubtedly if the Navajo Court would have found Respondent Singer guilty of civil fraud, the Cross-Petitioners would have taken every

D

THE QUESTION IS FLAWED AS IT DOES NOT REPRESENT THE COUNTY AND DISTRICT AS QUASI-MUNICIPAL CORPORATE CONSTITUENT ORGANIZATIONS

The question is flawed because it is not raised by the County or District as constituent, quasi-municipal organizations. *Unquestionably, the County and District, as organizations, are the only party with legal authority to control their own litigation, and this authority has been denied.* Here, there is one law firm alleging to represent the County and all the individual County wrongdoers. There is also, only one law firm representing the District and all the District individual wrongdoers. The organizations of taxpayers automatically have claims against the tried and found wrongdoing individuals. See, *Salt Lake County v. Short*, 1999 UT 73, docket no. 980074 at No. ¶ 34 "In conclusion, we find that the County Attorney only has an attorney-client relationship with the County, and ***not*** *with the Commission and its individual Commissioners.* The Commission cannot hire independent counsel to serve in an advisory capacity, but there are certain circumstances *where the hiring of an independent counsel will become necessary.*" Indeed, it was apparently cross-petitioner Craig Halls, County Attorney's duty to obtain independent counsel for the County and to ensure the District had adequate ethical

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opportunity to use the Court's ruling to their advantage. They can't have it both ways.

On January 14, 2002, Counsel Jesse Trentadue orally argued to the Tenth Circuit court that the District was an 'arm of the County' under the County's direct supervision as to financing, policies, hiring decisions, etc. This 10th circuit court oral assertion conflicts with the current assertion that the county is a "distinct and independent entity, separate from San Juan County." County cross-petition page 4.

representation. See Utah Bar Ethics' opinion 98-6, fn.7 below. Under Utah standards, the conflict is so great that the County and the wrongdoing County officials, can not have the same counsel. See, Utah Bar Ethics Opinions 98-6, 115, 115r. **30**

Dauntingly, the Insurance Company Reservation of Rights letters decline coverage for the organizations (P.S.L. 40-44, 45-53) " and may, in some circumstances, be entitled to and may seek reimbursement of any defense or indemnity payments.... We want the hospital to understand this so that it can conduct the defense with coverage issues in mind." (P. S. L. 43, 51, 7). **31** An incentive for officials to deny County and District

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30 "We also conclude, however, that the generally applicable conflicts rules of the Rules of Professional Conduct apply to each county attorney and deputy county attorney ...A county attorney or deputy county attorney who cannot individually satisfy the requirements of these rules should not engage in, supervise, direct, or have access to confidential information pertaining to the representation in question." Utah Bar Ethics opinion 98-06. Any attorney representing the County or District would have the same conflicts with representing wrongdoers. http://www.utahbar.org/opinions/html/98-6.html
"Further, the government has a "duty to advance the public's interest in achieving justice, an ultimate obligation that outweighs its narrower interest in prevailing in a lawsuit."" Utah Bar Ethics opinion 115. http://www.utahbar.org/opinions/html/115.html
http://www.utahbar.org/opinions/html/115r.html
The comment from Rule 1.13 of the Utah Rules of Professional Conduct states "[a] lawyer for the government may have a legal duty to question the conduct of government officials and perform additional remedial or corrective actions including investigation and prosecution." Utah Rules of Professional Conduct Rule 1.13 cmt. (1999).

31 Under Utah Ethics Rule Opinion 115 and 115r, opposing parties and counsel may communicate with government officials freely even about litigation though since they took office, Respondents' counsel has yet to discuss this litigation with them, though some court documents have been personally served upon them.

organizations separate counsel that may conflict with the offenders' litigation.

Utah's Rules of Professional Conduct at Rules1.3 (diligence), 1.4 (communication), 1.6 (confidential information),1.7 (conflict of interests and required waivers), 1.9 (conflict of interest, former client), 1.10 (imputed disqualification), 1.13 (organization as the client), 3.3 (candor to the tribunal), and 3.4 (fairness to the opposing party), mandate these two law firms had an unmitigated and unwaivable DUTY to inform the Counties' new Commissioners Morgan and Stevens, did not, and all District's newly appointed governance officers, once they took office, as to the insurmountable conflicts, rights, duties, and obligations of these organizations, the need for the organizations to have separate and wholly independent counsel. Commission records since January 1, 2003 show this communication didn't happen. (P.S.L. 7).

This current representation style, no matter how official the title 'unified defense' may sound when surrounded with a sophistry of words, directly harms the Respondents (1) by denying them access of all the Federal Rules of Civil Procedure to use to expedite resolution of claims under Rule 1; (2) by eliminating the benefit of candor to the Respondents and to the Court under Rule 3.3, if the County, and District, as organizations, would have performed 'additional remedial and corrective actions including investigation and prosecution.'; (3) by fostering the bad faith litigation in Navajo Court and frivolous and meritless claims of immunity in Federal Court; and (4) by creating a procedural nightmare that has prolonged litigation to the DIRECT harm of the Navajo patients and Respondents. To grant these cross-Petitions would continue to allow the wrongdoers to avail themselves of this Court in the name of these separate governmental organizations that

are state- mandated to achieve the ends of justice- thus possibly cloaking the wrongdoers with any kind of presumptions of correctness- as has apparently occurred in Federal Court and Appeals Court. This Court should not support such defenses as a national policy by granting their petition.

III

THEORIES OF MUTUAL CONCESSION CUT FOR THE RESPONDENTS NOT THE CROSS-PETITIONERS

Blatchford v. Native Village of Noatak, 501 U. S. 775 (1991) does not apply to political subdivisions or individual wrongdoing officials. It is a *State* reciprocity, *not county or district*, case as are *all* the other Cross-Petitioner's cases. Another subtle slight of hand.**32** Cross- Petitioners do properly inform this Court that the Navajo Nation chapters are essentially 'arms of the Tribe'. See, County Cross petition page 13, *White Mountain Apache Indian Tribe v. Shelley*, 480 P2d. 654, 656-657(Ariz. 171). Therefore, the idea of a independent political subdivision that can sue and be sued, and an Indian village or chapter that can not, being mutually alike for reciprocity is in gross error by Cross-Petitioners own case law. However, under *C. & L. Enterprises, Inc v. Citizen Band Potawatomi Indian Tribe of Oklahoma, No. 00-292 (2001)* this Court found the Potawatomi Indian Tribe assented to State Court jurisdiction by way of a contract provision. Here, there could not be a greater assent to Navajo Court jurisdiction

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32 District Cross-Petitioners brief page 13 "San Juan County Defendants enjoy sovereign immunity as codified in the Utah Governmental Immunity Act and the common law because there is no mutuality of concession between Utah or its political subdivisions and Indian tribes. " The quote would be accurate except for the additions words " or its political subdivisions". It is a State case. See, also Utah's *Lyons, supra.*

than by filing a counterclaim and paying the filing fee, creating a contract with the Navajo Court itself, for its services that the Navajo Court in reliance provided.. The reciprocity notions of *Blatchford, and Potowatami*, for the Navajo Court contract for court services should be upheld. No state immunity applies.

CROSS-PETITIONS FAIL TO REBUT THE NAVAJO COURT FINDINGS

Cross-Petitioners do not dispute, they " failed to show how a minor political subdivision of a state can benefit itself and taxpayers of the district by *voluntarily* seeking out and entering into contracts with Navajo citizens, within the Navajo Nation boundaries, and then treat the Navajo Nation's customs and traditions; Bill of Rights; the Navajo Preference in Employment Act; the Utah Merit system requirements, and HIS [sic I.H.S.] contract obligations, all with impunity, and believe that the district is somehow immune from claims injury; " (P. Ap. D 100a). The Cross-Petitioners' case law did not address ' Navajo civil rights."(P. Ap. D. 99a). The Navajo Court reasoned the Respondents could not be an "'arm of the state' if it is violating the laws of the State wherein it seeks to obtain immunity...". (P. Ap. 100a.). Cross-Petitioners also fail to counter the Navajo Court's finding they "failed to show how a minor political subdivisions limited governmental authority exceeds that of the entire Navajo Nation sovereignty, particularly when the injury sustained by the plaintiffs so specifically directly effects the health and welfare of the Navajo Nation chapters and their residents pursuant to the Montana exception of Strait v. A-1 Contractors." (P. Ap. 100a).

Cross petitioners do not deny, "If minimal research had been done by the defense, and the truth had been told, the TRO could have been simply replaced by the Preliminary Injunction on May 14, 1999, with no further deprivations to the plaintiffs of rights, time money,

embarrassment and loss of reputation by a trial by tabloid conjured by the defendants. Further, numerous diabetic patients would not have continued to go without treatment for a life threatening disease." P. Ap. 95a. Respondents have been unable to find a federal court to simply enforce these orders without retrying the case and applying federal or state law, displacing Navajo legal standards for contracts, contempt, and on- reservation contacts (P.Ap. 60a, 61a, 63a, 15a,) or use any other unpredictable and unknown artifices 'unmoored' from previous Indian law, to prevent, at all costs, even human life, these Navajo orders from being carried out against these primarily white men and women, despite all their undisputed enumerated wrongful acts. The Court can (1) support Congress and the Tribe and OUR nations' plan for OUR *equal* fellow Indian citizens, or (2) support the wrong doers immunity and create havens of lawlessness across this great nation, as long as only Indians are harmed and expendable, *but not both.* "No one debates the Orders and fines are civil for 28 U.S.C. § 1738. *Halwood, supra.*. Immunity is not part of sec. 1738." "The world will little note, nor long remember what we say here, but it can *never* forget what they did here." Abraham Lincoln, Gettysburg Address 1863.

CONCLUSION

Based upon the foregoing, the Respondents urge this Court to deny the Petitioners cross-petitions seeking state sovereign immunity for their wrongful acts and grant the Respondents original petition.

Susan Rose
Counsel of Record
9553 South Indian Ridge Drive
Sandy, Utah 84092
(801) 545-0441
Attorney for the Cross-Respondents

W.M. P. Battles
Navajo Court Counsel
For the Cross-Respondents
Assisting on the brief

(Any footnotes trail end of each document)

SR-CV-162-99-CV

IN THE DISTRICT COURT OF THE NAVAJO NATION
JUDICIAL DISTRICT OF SHIPROCK

DONNA SINGER; Fred Riggs C# 18576;
Alison Dickson C# 212,765;
Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health Services District; Rick Bailey, Reid Wood, Mary Nielsen, Lauren Shafer, Commissioner Bill Redd; Commissioner J. Tyron Lewis; Roger Atcitty; Atcitty; John Lewis; Mark Maryboy fn1; Craig Halls; Patsy Shumway fn2; Karen Adams and other John and Jane Does as yet unnamed In their personal and official capacities
Defendants,

Application for Preliminary Injunctive
and Temporary Relief (Rule 65)

NOW COMES Donna Singer (Mrs. Singer); Fred Riggs. Census No. 18576 (Mr. Riggs); and Alison Dickson, Census No. 212765 (Mr. Dickson), by and through their undersigned counsel, and having filed prior hereto their complaint for- damages, herein respectfully make application to the District Court for Injunctive and Temporary Relief pursuant to Rule 65, of the Navajo Nation Rules of Civil Procedure as follows:

JURISDICTION

1) That the plaintiffs, and each of them, are or were employed by the San Juan Health Services District at the Montezuma Creek Health Clinic located exclusively within the territorial jurisdiction of the Navajo Nation at or near Montezuma Creek, Navajo Nation (Utah); and,

2) That the defendants, and each of them, conducted a for profit enterprise at the Montezuma Creek Health Clinic located exclusively within the territorial jurisdiction of the Navajo Nation at or near Montezuma Creek, Navajo Nation (Utah), under contractual relations with the Utah Navajo Trust Fund, and the Indian Health Service, to provide necessary health and medical services to residents of the Navajo Nation residing within the Utah Strip of the Navajo Nation; and,

3) That this Court has jurisdiction over the parties and subject matters herein pursuant to the 7 NNC 253, and 7 NNC 254 and 7 NNC 256; and,

PARTIES

4) That the plaintiffs herein have filed their complaint for damages against the defendants, individually and collectively, in each of their official and private capacities (with the exception of Mark Maryboy and Patsy Shumway who are held in suit only in their official capacity) express and implied, at the time the claims arise herein, until now, in the following particulars

a. San Juan County as the governing authority over San Juan Health Service District; and,

b. San Juan Health Service District (SJHSD) as the empoyer of the Plaintiffs and San Juan County's alter ego; and,

c. Commissioner Bill Redd, a San Juan County Commissioner and SJHSD Trustee and Administrative Board Member; and,

d. Commissioner J. Tyron Lewis a San Juan County Commissioner and SJHSD Trustee and Administrative Board Member; and,

e. Commissioner Mark Maryboy, a San Juan County Commissioner and SJHSD Trustee and Administrative Board Member (in his official capacities only); and,

f Rick Bailey (NB. Bailey), San Juan County Administrative Aide, and SJHSD interim Executive Director and CEO; and,

g. Reid Wood (Mr. Wood), SJHSD interim CEO, and now permanent SJHSD CEO; and,

h. Mary Nielsen (Mrs. Nielsen) SJHSD Chief Financial Officer; and,

i. Lauren Shafer (Mrs. Shafer) Patient Services Director; and,

j. Roger Atcitty (Mr. Atcitty), Chairman of the SJHSD Administrative Control Board; and,

k. Karen Adams (Mrs. Adams) a SJHSD Administrative Control Board Member; and,

l. John Lewis (Mr. Lewis) a SJHSD Administrative Control Board member; and,

m. Patsy Shumway (in her official capacity only), a SJHSD Administrative Control Board member; and,

n San Juan County Attorney Craig Halls (Mr. Halls); and,

o. Other John and Jane Does as yet unnamed, in their personal and official capacities (with the exceptions of Mark Maryboy and Patsy Shumway who are held responsible in only their official capacities. express and implied) with violations of the Plaintiffs, and each of the Plaintiffs, rights and claims under the Navajo Bill of Rights; Navajo Nation Code (NNC); Navajo customs and traditions among other sources of law; the Navajo Preference in Employment Act (NPEA); as better and further demonstrated in the attached Navajo District Court Complaint for Damages and Office of Navajo Labor Commission complaint and request for Preliminary Relief, and other pleadings, documents and exhibits thereto and herein.

5) That the plaintiffs seek immediate injunctive and temporary relief for violation of their Navajo Nation Civil Rights, common law torts, and other legal claims as are better enumerated below, du to the irreparable harm that has occurred and is occurring to the plaintiff and the communities of the Navajo Nation, Red Mesa and Aneth Chapters, as plaintiffs allege in the following:

IRREPARABLE HARM

6) That the plaintiffs have exhausted all viable and reasonable administrative remedies available to them consistent with the applicable Personnel Polices and Procedures of the San Juan Health Service District.

a. That future SJHSD administrative remedies are denied as the administrator the plaintiffs are grieving is now the equivalent of the Executive Director, and there are no applicable policies for further grieving to the Executive Director; and,

b. That any grievance panel consisting of board members and the Executive Director is inherently flawed and tainted; and,

a. That plaintiffs have filed individual grievances for their labor claims with the Office of Navajo Labor Relations and the Navajo Nation Labor Commission, which are currently under investigation; and,

d. The plaintiffs seek protection of their civil rights which have been irreparably harmed; and,

e. Which will continue with out the benefit of interim rebel from this Court.

DUE PROCESS CLAIMS

7) That the San Juan Health Service District has denied Mrs. Singer and Mr. Riggs, and Mr. Dickson of their due process rights by acting in a manner that is contrary to the applicable Personnel Policies and Procedures of the San Juan Health Services District; the Navajo Preference in Employment Act; the Navajo Bill of Rights; and the applicable Utah Merit System act of the State of Utah,

Mrs. Singer and Mr. Riggs

a) By denying their right to a pre-discharge and pre-disciplinary hearing with their supervisor; and,

b) By denying their right to be confronted by their accusers; and,

c) By denying their right to present evidence and compulsory witnesses on their own behalf, and,

d) By denying their right to know ahead of time what evidence and witnesses will confront them; and,

e) By denying their right to have a fair and impartial hearing officer decide the matter of the allegations made against them; and,

f) By denying their right to have a clear and unequivocal statement of the charges upon which Mrs. Singer's discharge and Mr. Riggs' discipline and RIF is based; and,

g) By denying their right to a clearly enumerated list of evidence upon which the discharge and discipline and failure to reinstate them whole are based; and,

h) By denying their right to a hearing panel that is not inherently structurally flawed nor tainted; and,

i) By denying their right to a timely hearing and timely decision; and,

j) By denying their right to a decision with clearly stated facts and conclusions of law; and,

k) By denying their right to have the burden of proof of their 'fraud' allegation rest with the accuser, rather than San Juan Health Services District placing the burden of proving their innocence upon them; and,

l) By denying their right to have and expect employment policies to be carried out in an impartial and uniform manner throughout the employees of the San Juan Health Services District; and,

Mr. Dickson

m) By denying Mr. Dickson's right to any type of a fair and impartial hearing to be given his permanent full time status, as evidenced by all the above violations by the defendants and Mr. Wood's statement referencing that since no action was taken, there was none to grieve; and,

n) By denying Mr. Dickson right to any type of impartial hearing officer, as the person denying him his permanent status is now the CEO of San Juan Health Services District; and,

EQUAL PROTECTION CLAIMS

8) That the San Juan Health Service District has denied Mrs. Singer: Mr. Riggs and Mr. Dickson of their equal protection rights by the San Juan Health Service District by treating the plaintiffs, and each of them, as the staff and employees of the Montezuma Creek Health Clinic, differently, uniquely, and unequally, in a racial and otherwise discriminatory fashion as distinquishable from the remainder of the staff and employees of the San Juan Health Service District with the only known distinction being their associations by blood and linage to the Navajo Tribe of Indians and as Native Americans, a protected political class, as set out in the foregoing, and as further set out in the complaints to the Navajo Nation Labor Relations office; Navajo Nation Labor Commission, and the underlying Court complaint herein, contrary to the applicable Personnel Policies and

Procedures of the San Juan Health Services District; the Navajo Preference in Employment Act; the Navajo Bill of Rights; and the applicable Utah Special District Personnel Management Act of the State of Utah, and in violation of the San Juan Health Service District's fiduciary responsibilities under is agreements with the Utah Navajo Trust Funds and the Indian Health Service contracts upon which the Montezuma Creek Health Clinic relies; and,

DENIALS OF THE RIGHTS OF FREE SPEECH AND ASSEMBLY

9) That the San Juan Health Service District has denied Mrs. Singer; Mr. Riggs and Mr. Dickson their rights of free speech and assembly:

a) That Mrs. Singer did speak out at board meetings about ambiguous budget expenses being placed upon Montezuma Creek Health Clinic, and,

b) That Mrs. Singer did speak out as a private citizen in support of a private hospital coming into Blanding, Utah that would take some business from Monticello' s hospital, but improve health for the people in the south part of San Juan County; and;

c) That because Mrs. Singer did speak out at board meetings she has been called 'insubordinate' and 'intrusive' and 'probing' and in places where she shouldn't have been; and,

d) That she has been labeled as 'evil' and 'enemy to the hospital' and 'cancerous' and a 'liar and a cheat' for a four hour time card error, wherein in fact someone unknown to Mrs. Singer clocked in on her card on

November 13, 1998 when she was not in Montezuma Creek that morning; and,

e) That she has been charged with 'time card fraud'; and,

f) That no evidence supports this charge; and,

g) That Mrs. Singer has no evidence in her entire nearly 18 year personnel file of any dishonesty at any time until the allegation of December 1, 1999; and,

h) That the said discharge occurred within approximately two weeks of Mrs. Singer speaking out at the November SJHSD public board meeting; and,

i) According to San Juan Health Service District's Personnel Policy and Procedures, Mrs. Singer was discharged for time card problems that were unnecessary because she was Fair Standards Labor Act(FSLA) exempt; and,

j) Mr. Riggs charged Mr. Wood with discrimination; and,

k) Mr. Wood withdrew a promotion he had offered Mr. Riggs a few days before; and

I) Mr. Wood has admitted on February 12, 1999 that he withdrew Mr. Riggs promotion because Mr. Riggs by using his right to speak, charged Mr. Wood with discrimination; and,

m) Mr. Wood later misrepresented to Mr. Bailey that Mr. Riggs had received a verbal warning documented to his file, when in fact Mr. Wood had taken Mr. Riggs

through every step of discipline, but for termination, for his first time card error in 23 years; and,

n) Mr. Riggs was FLSA exempt; and,

o) Mr. Riggs had never been given training on time cards; and,

Mr. Dickson

p) Mr. Dickson signed an affidavit documenting the January 5, 1999 racially insensitive and derogatory statements by Mr. Wood and Mrs. Nielsen; and,

q) They have denied him Mr. Dickson's right to be considered a permanent full time employee, though he has worked the commensurate hours and received an excellent evaluation; and,

r) They have labeled Mr. Dickson as insubordinate and rebellious because Mary Nielsen 'doesn't like her words used back against her' because it 'makes her mad'; and

s) Mr. Dickson has had his job threatened first for asking to be given his permanent status and secondly by having his position moved to Monticello; and,

DEFAMATION

10) That the San Juan Health Service District has defamed Mrs. Singer; Mr. Riggs and Mr. Dickson intentionally, falsely, and wrongfully, and have committed tortious interference with future employment contractual relations of Mrs. Singer; Mr. Riggs and Mr. Dickson:

a) Mrs. Singer and Mr. Riggs have been charged with fraud, that as part of their personnel file prevents them from looking for a new job due to the accompanying necessity of further defaming themselves by having to explain this charge; and,

b) Fraud is a charge that will cause harm per se; and,

c) Mrs. Singer has been labeled as an 'enemy' 'liar and cheat' 'cancerous' 'evil' among the administrators and supervisory staff and San Juan Health Service District Board; and,

d) Public Health employers review prospective employees files and so the fraud charges for Mrs. Singer and Mr. Riggs will inevitably ruin their careers and limit Mr. Dickson's; and,

e) Mr. Dickson is being labeled a 'temporary' or 'part time' person, thus limiting his opportunity to obtain a job that may require that he have worked as a permanent 'full time' employee; and,

f) Mr. Dickson is one of the billing clerks at Montezuma Creek Health Clinic that has been labeled 'insubordinate' and 'rebellious' which was published in the paper and on the radio for the cause of exercising their free speech; and,

THEFT

11) That the San Juan Health Service District has committed theft in the wrongful and malicious taking of the words and reputations of the plaintiffs Mrs. Singer; Mr. Riggs, and Mr. Dickson; and,

12) That Mr. Wood has admitted that there was a serious time card problem in the system and that it had to stop; and,

13) That Mr. Wood told other Montezuma Creek Health Clinic staff members not to speak to Mrs. Singer and Mr. Riggs when they were given the 'fraud' charge and placed on paid administrative leave; and,

14) That defendants seriously and intentionally injured Mr. Riggs and Mrs. Singer's reputation, and future employment possibilities, for the public purpose of making them examples for the public purpose of stopping time card problems and stopping people from informing the SJHSD board, public and others of the defendants' wrongful acts and attitudes and,

15) That the damage is ongoing, serious and substantial, and the only way for the plaintiffs to be free of this charge is if this court grants relief as quickly as possible from the repercussions of these foundationless and scourilous charges by having the defendants remove them from their files, or have their files placed in the privacy of the Office of Navajo Labor Relations; and,

CONSPIRACY

16) That the San Juan Health Services District defendants have conspired within and without itself to deprive Mrs. Singer; Mr. Riggs and Mr. Dickson with their lawful rights and entitlements by acting in concert to discharge, and discipline, and not give Mr. Dickson his permanent full time status; and

17) That Mrs. Nielsen and Mr. Wood conspired to deprive the Navajo people of their pre paid health care

entitlement with the 'CIB policy' that if carried out may lead to someone's death or other catastrophy; and,

INTERFERENCE PUBLIC POLICIES OF THE NAVAJO NATION

18) That the actions of the San Juan Health Service District have substantially damaged and impaired the ability of the Montezuma Creek Health Clinic to provide proper services to the local communities of the Navajo Nation and in the rights of the Navajo Nation to enact its own laws and the Navajo people and others to be protected and controlled by them within the territorial jurisdiction of the Navajo Nation:

LIKLIHOOD OF SUCCESS ON THE MERITS

19) That Plaintiffs will likely succeed on the merits of their respective claims due to:

a) Lack of any prior warning letters or progressive discipline prior to Mrs. Singer's and Mr. Riggs discipline; and,

b) Lack of any equal treatment of the plaintiffs with other San Juan Health Service District employees; and,

c) Lack of any uniformity of discipline through out the, San Juan Health Service District; and,

d) Lack of defendants' acknowledgement of, and compliance with Navajo, federal and state statutes and regulations that mandamously govern it, and

e) The malicious abuse of discretion, arbitrary and capricious willingness of defendants to destroy the

future ability of plaintiffs to seek life, liberty and the pursuit of happiness; and.

f.) The viscious manner in which defendants have intentionally and negligently inflicted emotional distress upon the plaintiffs and other employees of Montezuma Creek Health Clinic.

LACK OF AN ADEQUATE REMEDY AT LAW

20) Plaintiffs can not wait for a trial to obtain an adequate remedy for their civil rights violations or the harm being done to the community because as time passes, the seriousness of the patient services and employment problems is increasing; and,

21) That, the defendants, not fearing any short term repercussions, are likely to harm other people within the SJHSD system; and,

22) That traditionally the Courts have found that injunctive relief is the remedy best suited for civil rights violations that are priceless, inherent, and undeniable.

PRAYER FOR RELIEF

The plaintiffs pray for injunctive and temporary relief, and any other relief including RESTRAINING ORDERS as the Court sees fit, and until the proceedings of this Court are finished against San Juan. County et al, defendants, collectively and individually, and in their official and private capacities, and with San Juan Health Service District, at all times herein, being the alter ego of San Juan County and encompassing all other defendants, to protect plaintiffs

1. From continued violation of plaintiffs' and Navajo Nation tribal members fundamental rights as enumerated above and throughout this action, as contained or referenced, in the plaintiffs Initial Complaint, and Application for Injunctive and Temporary Relief; the Memorandum of Law and the attached Plaintiffs exhibits, ONLR complaints and Labor Commission pleadings.; and,

2. From further interference with Mrs. Singer's ability to manage Montezuma Creek Health Clinic; and, until such time a final judgment is issued in this case and in accordance with the announced directives of the Aneth and Red Mesa Chapter's resolutions to the Utah Navajo Commission and San Juan Health Service District; and,

3. From interacting with all plaintiffs and Montezuma Creek Health Clinic personnel and patients in any manner other than a manner that bespeaks equality, fairness, respect and dignity that is fundamental to all human beings; and,

4. That all of Mrs. Singer's back pay and benefits be reinstated from the date of discharge until the present and forward; and,

5. That Mrs. Singer will no longer report directly to the enumerated defendants about the operation of Montezuma Creek Health Clinic; and,

6. That Mr. Riggs be reinstated to his previous position with back pay and benefits from the date of his alleged RIF and forward; and,

7. That Mr. Dickson is to be immediately given his permanent full time status at 40 hours a week with back

pay and benefits to the time he finished working 520 'non-temporary' hours; and,

8. That Mr. Riggs' and Mrs. Singer's files be expunged of all records of allegations of 'fraud'; 'misconduct', and 'violations', and,

9. That any new employees defendants' have hired, ultra vires inconsistent with the NPEA, and other Navajo law, and Utah merit system principals consistent with Navajo Law, be declared by this Court as null and void for any employment purposes at Montezuma Creek Health Clinic; and,

10. That the defendants pay all the plaintiffs' attorneys fees and legal costs, within 5 working days, by Cashier's check, at the same rate of pay as SJHSD contracted to pay Ms. Karra Porter, Esq., in addition to other counsel, as cumulatively totaled per hour.

A SPECIAL MASTER

11. That, under Navajo Nation Rules of Civil Procedure Rule 53, a SPECIAL MASTER, be appointed and will be endowed as an officer of this Court with all the necessary powers and authorities, including the discretionary authority to direct the Navajo Nation Police, in their tribal and federal capacities, to assist in carrying out the following Court directives with the following enumerated powers, duties and authorities;

The SPECIAL MASTER:

a) Will report directly to the Court at least once every two weeks on the welfare of Montezuma Creek Health Clinic, and,

b) Will supervise the execution of any and all Navajo Nation District Court orders, ONLR or Labor Commission orders; and,

c) Will report once a week, to a person the defendant's may appoint to receive the Montezuma Creek Health Clinic management report- other than Mr. Wood, Mrs. Nielsen, or Mrs. Shafer; and,

d) Will receive Mrs. Singer's management report describing the activities occurring at Montezuma Creek Health Clinic; and,

e) Will protect all Montezuma Creek Health Clinic personnel and patients from being abused (verbally, physically, emotionally, or mentally) by the defendants; and,

f) Will prevent the movement of any employment positions out of Montezuma Creek Health Clinic, unless it is in the very best interest of the Navajo Nation citizens health and general welfare; and,

g) Will assure that the billing records, and all other financial records at Montezuma Creek Health Clinic will not be moved from the clinic property, altered, or tampered with in any way and will be secure upon the premises of Montezuma Creek Health Clinic, and,

h) Will assure that reproductions of said financial records can be made, in the presence of, and under the direction and supervision of the Montezuma Creek Health Clinic staff for purposes of all parties involved provided that the defendants, with the exception of Mr. Maryboy and Mrs. Shumway, are not to enter onto the Montezuma Creek Health Clinic property without the SPECIAL MASTER'S express approval; and,

i) Will if appropriate in the SPECIAL MASTER'S best judgement seek assistance for the Navajo Nation Legislative Auditor's office with a request to audit the Utah Navajo Trust Fund and SJHSD financial records; and,

j) Will assure that no patients of Montezuma Creek Health Clinic are turned away due to lack of their 42 C.F.R. 63.16 Beneficiary Identification Card, if they are otherwise eligible for treatment; and,

k) Will instruct the Navajo Nation Police, acting in their local and federal authority:

1. To immediately collect and copy, on the SJHSD premises, all the SJHSD item by item expense records, bank records of deposit and withdrawals, and records of cash collections, for the past five years; and,

2. To immediately collect and copy the patient account records of Monticello Hospital for the last two years; and,

3. To take said financial records for safekeeping to the ONLR office in Shiprock, Navajo Nation (NM); and,

4. To go to the Utah Navajo Trust Fund office in Blanding, Utah, and copy all the bank records and other records of withdrawals and deposits, from 1993 forward until the current date, and remain on the premises until the copying is complete; and,

5. To collect plaintiff's personnel and financial time card files from the San Juan Health Service District in Monticello, Utah, and deliver the said file to the Office of Navajo Labor Relations in Shiprock for reproduction, protection and preservation pending further Court

proceedings, and the Office of Navajo Labor Relations and the Navajo Nation Labor Commission proceedings; and,

a. That defendants will have access to said copies for their own reproductions; and,

6. To enter onto the Monument Valley premises and collect and destroy all 'CIB policy' signs; and,

l) That the SPECIAL MASTER will have complete authority to enforce any order he issues acting in the best interest of Montezuma Creek Health Clinic with Navajo Nation Police within their tribal and federal authority; if necessary; and,

m) That the cost of the SPECIAL MASTER'S salary, as designated by the Court, and the costs accrued for the designated audits of records, and other actions ordered by the SPECIAL MASTER shall be paid by the defendant's as is considered reasonable by this Court in accordance with Navajo Rule of Civil procedure 53; and,

n) That if the cost of the SPECIAL MASTER is not paid within 30 days of request, then the Court may have to attach those moneys that are designated to go to the trust fund that the County eventually obtains from mineral and oil rights in the Utah Strip; and,

o) That Mrs. Singer will be give great latitude and cooperation by the SPECIAL MASTER, to carry our her duties in the best interest of Montezuma Creek Health Clinic and the neighboring communities; and,

12. That pending an exclusionary hearing, (within this Court's jurisdiction under 17 NNC §§ 1901, and 1902 and the Navajo Nation's undiminished inherent

sovereign powers under the Treaty of 1868), Mr. Wood, Mrs. Nielsen, and Mrs. Shafer, be RESTRAINED from entering, and ORDERED NOT TO ENTER, (except for the very limited and specific purpose of attending the Navajo Nation Court and Labor proceedings involved in this case), onto and within the Navajo Nation's territorial boundaries due to the defendant's

(1) endangering the public's health and safety through the implementation of the illegal CIB policy within Navajo Nation boundaries; and,

(2) irreparably injuring plaintiffs' rights; and,

(3) stealing plaintiffs speech and reputations without just compensation; and,

(4) attempting to deny the plaintiffs further due process by threatening witnesses with removal of their employment positions; and,

(5) having discriminatory attitudes toward the Navajo people and people of color; and,

(6) violation of the defendants' fiduciary duties under their Utah Navajo Trust Fund agreement and the Indian Health Service contracts; and,

13. That, the defendants be immediately ordered to decease and desist from turning away any otherwise eligible Indian patient, pursuant to 42 CFR § 36.16, away from defendant's health care facilities; and,

14. That defendant's be restrained from continuing to violate Navajo and Utah codes, and immediately inform all employees and patients of their Navajo legal rights and protections, Indian Health Service, Medicaid, and

Medicare rights and protections, and their merit system rights and protections under NPEA and the Utah Code 17A-§§ 601-603 by posting signs written in English, Ute, and Navajo, in all facilities within the next 24 hours.

Based on the foregoing, Plaintiffs pray for immediate Preliminary Injunctive relief, pending further proceedings of the Court, and all other relief as the Court deems appropriate for the Plaintiffs, and restitution of their civil rights.

So signed and date this 8th day of April 1999.

Wm. P. Battles Esq.
Wm. P. Battles and Associates
Post Office Drawer 460
Window Rock, Navajo Nation (AZ) 86515
(520)-871-2525/2527

Susan K. Schildmeyer Utah liar No. 1985
8950S. Sandia Hills Dr. Suite 2156
Sandy, Utah 84094
(801)-256-9477
Counsel for the Plaintiffs

Footnotes

Fn1 Mr. Maryboy is sued in his OFFICIAL capacity express and implied, only.

Fn2 Mrs. Shumway is sued in her OFFICIAL capacity, express and implied, only.

SR-CV-162-99-CV

THE NAVAJO NATION DISTRICT COURT
JUDICIAL DISTRICT OF SHIPROCK

DONNA SINGER; Fred Riggs C# 18570;
Alison Dickson C# 212,765;
Plaintiffs,

vs.

SAN JUAN COUNTY; San Juan Health Services District; Rick Bailey, Reid Wood, Lauren Shafer, Craig Halls; Commissioner Bill Redd; Roger Atcitty; Mark Maryboy fn1; John Lewis; Commissioner J. Tyron Lewis; Karen Adams; Patsy Shumway fn2; R. Dennis Ickes, Truck/Farmer's Insurance Company, and other John and Jane Does as yet unnamed In their personal and official capacities
Defendants,

COMPLAINT FOR DAMAGES
(Modified)
(Jury Trial Requested)

NOW COME THE PLAINTIFFS, Donna Singer (Mrs. Singer), Fred Riggs, (Mr. Riggs) and Alison Dickson (Mr. Dickson), by and through the undersigned counsels, and to the best of their information and belief, allege the following cause(s) of action against the defendants, and each of them, in their official and private capacities (except Mr. Mark Maryboy and Mrs. Patsy Shumway and Mary Nielson) both jointly and severally at all times herein and throughout, in this modified complaint wherein all modifications are identified with underlining for the convenience of the Court and opposing counsel,

in accord with traditional recognized methods used in modifying legislation, as follows:

THE PARTIES

As to the Defendants

1. That each of the defendants herein stated, with the exceptions of Mark Maryboy and Patsy Shumway and Mary Nielson, are sued, hereinafter and throughout this suit, in their official and individual capacities, both express and implied, jointly and severally; and,

2. That San Juan County, a Utah county, is sued as governing authority over the San Juan Health District and in its own right.

3. That San Juan Health Services District (SJHSD) is sued as the employer of the plaintiffs and, at all times herein and throughout this legal action, San Juan County's alter ego.

4. That Commissioner Bill Redd (Bill Redd) is sued as a San Juan County Commissioner and SJHSD Trustee and Administrative Board member.

5. That Commissioner J. Tyron Lewis 9 Tyrone Lewis) is sued as a San Juan County Commissioner and SJHSD Trustee and Administrative Board member.

6. That Commissioner Mark Maryboy (Mark Maryboy) is sued in his official capacity, express or implied, only, as San Juan County Commissioner and SJHSD Trustee and Administrative Board member.

7. That Patsy Shumway (Mrs. Shumway) is sued in her official capacity, express or implied, only, as SJHSD Administrative Board member,

8. That Rick Bailey (Mr. Bailey) is sued as San Juan County Administrative Aide and SJHSD interim Executive Director and CEO.

9. That Reid Wood (Mr. Wood) is sued as SJHSD interim CEO, and now permanent CEO.

10. Delete

11. That Lauren Shafer (Mrs. Shafer) is sued as SJHSD Personnel Director of Nursing.

12. That Roger Atcitty (Mr. Atcitty) is sued as Chairman of the SJHSD Board.

13. That Karen Adams (Mrs. Adams) is sued as a SJHSD board member.

14. That John Lewis (Mr. Lewis) is sued as a SJHSD board member.

15. That San Juan County Attorney Craig Halls (Mr. Halls) is sued as the San Juan County Attorney;

16. That Patsy Shumway (Patsy Shumway) is sued in her official capacity, express or implied, only, as a SJHSD board member; and,

Additional Parties

16a. The plaintiffs add the defendants Dennis Ickes and Farmer's Insurance

Companies and Truck Insurance companies as defendants in caption and otherwise to these proceedings.

17. That these proceedings are brought under Navajo law, including but not limited to, the Navajo Nation Bill of Rights the Navajo Nation code, defendants contractual relationships-Utah Merit System Employment agreements, Utah Navajo Trust Fund agreements, Indian Health Service contracts, and Medicaid and Medicare contracts- conducted with the territorial jurisdiction of the Navajo Nation; Navajo Custom and traditions; the Navajo Preference in Employment Act including the United Nation Declaration of Human Rights, United Sates Bill of Rights, the Constitution of the State of Utah, and the Utah Code under 17A, 9-9-208, 9-9-209. Exhibit 2,3,4,5,12 and 21.

18. That all Labor Commission and Office of Navajo Labor Relations claims of the Plaintiffs will not be prohibited from being heard in this Court, after such time as the plaintiffs employment claims have gone through their respective administrative process.

19. That this court has jurisdiction over the parties and subject matter pursuant to 7 NNC 253 and 7 NNC 254, and the Navajo Nation's independent and inherent sovereignty that is encouraged by federal Statute at 25 U.S.C. 450a, and is undiminished by the Treaty of 1868, and Utah Code sections 9-9-208 and 9-9-209 among others, and the United States Supreme Court "Montana exception" in Montana V. United States, 450 US 544 at 565 to566 (11981). See likewise the attached MEMORANDUM OF LAW, attached hereto as Attachment C

STATEMENT OF FACTS

Plaintiffs

Mrs. Singer

20. Mrs. Singer has worked for San Juan County and the San Juan Health Care systems for approximately 18 years. Exhibit 64.

21. Mrs. Singer has been married to Louis Singer, en enrolled Navajo Nation member, at all times for 26 years. Exhibit 23.

22. The Singers' traditional residence is just outside Black Mesa, Navajo Nation.

23. Mrs. Singer has an employment record that demonstrates she received regular pay raise recommendations and implementations. Exhibit 24.

24. Mrs. Singer has steady increases in responsibility with management of Montezuma Creek Health Clinic as her last position. Exhibit 24.

25. Mrs. Singer was the manager of Montezuma Creek from the time it began SHJSD operations until on or about December 1, 1998. Exhibit 24.

26. Montezuma Creek was demonstrating profitable activities under Mrs. Singers leadership and management Exhibits 15 and 16.

27. Mrs. Singer, without written 'just cause' at that moment in time, was told to leave the building and not come back on or about December & 1998. Exhibit 64.

28. Mr. Wood admitted he discharged Mrs. Singer by consulting with others.

29. Mr. Wood admitted that "time cards" were not the problem or cause of Mrs. Singer's discharge from her employment Exhibit 39.

30. Mr. Wood has called Mrs. Singer a 'liar and a cheat'; the 'enemy'; 'evil', and 'cancerous' with no evidence or foundation in fact

31. Mrs. Nielsen has used these terms in aforestated in paragraph 41 to describe Mrs. Singer.

32. Mrs. Singer was discharged with an allegation of "time card fraud" and signing off on Mr. Riggs "erroneous time card". Exhibits 34-37.

33. Mrs. Singer over the years had made numerous minor time card mistakes. Exhibits 25,27,28,30,33 and 40.

34. Many people throughout the San Juan Health Services District system made time card mistakes. Exhibits 42.

35. Mrs. Singer made a mistake on the November 13, 1998 timecard. Exhibit 30.

36. Mrs. Singer was in Blanding when an unknown person at Montezuma Creek Health Clinic clocked in on her card. Exhibit 31.

37. Mrs. Singer received no official letter or notice with warning language concerning time card mistakes or errors in nearly 18 years of working for San Juan County and SJHSD. Exhibit 26.

38. Mrs. Singer received a letter from Mrs. Shafer congratulating her on the improvement in her time cards. Exhibit 29.

39. Mrs. Shafer knew Mrs. Singer had many serious and weighty matters to attend to at Montezuma Creek Health Clinic as part of her employment position and yet did nothing to put the time card mistake into the perspective of a reasonable person, and did nothing to prevent her discharge. Exhibit 64 and 65.

40. Mrs. Nielsen from time to time does not give people overtime pay if it was not approved ahead of time. Exhibits 42 and 30.

41. Mrs. Singer was not allowed to have overtime. Exhibit 30.

42. Mrs. Singer as a manage, and under Board approved SJHSD policies and procedures, was a Fair Labor Standards Act exempt employee. Exhibit 38.

43. SJHSD'S placing Mrs. Singer on time cards was in violation of SJHSD board policies.

44. SJHSD never instructed Mrs. Singer in the very serious labor law implications of time cards, except the legal importance of writing on them clearly

45. Mrs. Singer was not Mr. Riggs supervisor.

46. Mrs. Singer was not responsible for Mr. Riggs time card's approval

47. Mr. Wood was Mr. Riggs supervisor.

48. Mr. Wood as Mr. Riggs supervisor was responsible for reviewing Mr. Riggs "time card".

49, SJHSD never produced any evidence supporting an allegation of fraud against Mrs. Singer or Mr. Riggs.

50. Mrs. Singer was asking questions about ambiguous budget expense items put onto Montezuma Creek Health Clinic's budget at a public meeting of the Administrative Control Board of the San Juan Health Services District regular monthly scheduled meeting as a participating member of the audience. Exhibits 17 and 28.

51. Mrs. Singer was privately supportive of a private hospital coming into Blanding Exhibit 64.

52. Prior to termination Mrs. Singer publicly supported the private hospital. Exhibit 64.

Mr. Riggs

53. Mr. Riggs is a Physician's Assistant at Montezuma Creek Clinic. Exhibit 45.

54. Mr. Riggs has worked for SJHSD for approximately four years.

55. Mr. Riggs had a spotless twenty three year career until December 1, 1998.

56. Mr. Riggs had a substantial reduction in pay in November 1998 due to an alleged "Reduction in Force". Exhibits 45,46.

57. SJHSD's Reduction in Force did not comply with a merit system.

58. SJHSD's Reduction in Force did not comply with the Navajo Preference in Employment Act

59. SJHSD has not given Mr. Riggs any written notice explaining the NPEA's 'just cause' for his wage cut of November 1998.

60. That on the 11th day of November, 1998, Mr. Wood threatened Mr. Riggs employment when Mr. Riggs simply asked the administration how he was to paid for taking an emergency call scheduled later that day since he had just been put on time cards. Exhibit 45.

61. Mr. Wood is an FSLA exempt employee according to the SJHSD personnel policies and procedures.

62. Mr. Riggs was charged with "time card fraud" on or about 1st day of December, 1998. Exhibit 48.

63. Mr. Riggs was put on administrative leave with pay on or about December 1, 1998. Exhibit 48.

64. Mr. Riggs was allowed to return to work on a thirty day probation. Exhibit 50.

65. Mr. Riggs was kept on probation of over thirty days.

66. Mr. Riggs has not had the time card letters referring to 'fraud', 'misconduct', or 'violation' withdrawn from his file. Exhibit 48,49, and 50.

67. Mr. Wood, after the aforesaid discipline, offered a substantial promotion to Mr. Riggs. Exhibit 45.

68. Mr. Wood specifically wished to place Mr. Riggs over "time cards". Exhibit 45.

69. Mr. Wood has called Mr. Riggs "greedy".

70. Mr. Wood Withdrew the aforesaid job promotion offered to Mr. Riggs because Mr. Riggs accused Mr. Wood of discrimination.

71. Mr. Wood lied to Mr. Bailey about the severity of discipline he gave Mr. Riggs. Exhibit 51.

Mr. Dickson

72. Mr. Dickson is a medical records and billing clerk (PAR).

73. Mr. Dickson has worked for six months as a 'temporary full time' employee.

74. Mr. Dickson continued working after the individual he was filling in for, returned from maternity leave.

75. SJHSD continued cutting checks to Mr. Dickson for his work

76. SJHSD was aware Mr. Dickson had been working 40 hours a week

77. Mr. Dickson has worked over 5520 hours, in addition to the six months temporary position. ONLR complaint [attached]

78. SJHSD Personnel Policy and Procedures mandates that a person 'will" become a 'regular' employee after 520 hours. Exhibit 55.

79. Mr. Dickson has an excellent evaluation.

80. Mr. Dickson has requested hee be put on as a regular employee. ONLR complaint [attached]

81. Mr. Dickson has requested he be given permanent full time employee.

82. Mr. Dickson, pursuant to the applicable Personnel Policies and Procedures of the San Juan Health Services district has been recommended for full time status employment. Exhibit 61.

83. Mr. Wood misrepresented Mr. Dickson's work experience with the San Juan Health Services District and the nature and resolve of Mr. Dickson's grievance complaint to Mr. Bailey, and insisted in writing that Mr. Dickson be denied a grievance hearing. Exhibit 56.

84. That Mr. Dickson was denied his rights to a grievance hearing.

85. Mr. Dickson, prior to Mr. Wood's misrepresentation to Mr. Bailey, signed an affidavit as to racially insensitive and derogatory remarks and policies by Mr. Wood. [delete]. Exhibit 57.

86. Mr. Dickson has not been given his permanent status with the accompanying pay raises and benefits.

87. Mr. Dickson, as a Montezuma Creek Health Clinic billing clerk, has been publicly called 'rebellious' and 'slanderous' by Mrs. Nielson.

88. Mrs. Nielson's defamatory and slanderous name calling was published in a newspaper.

89. Mrs. Nielson is attempting to have the billing clerk positions moved to Monticello hospital.

90. Mrs. Nielson told Mr. Wood that Mrs. Singer was/is dishonest.

91. Mrs. Nielson told Mr. Wood on or about, or prior to, December 1, 1998 that Mrs. Singer was not in Blanding, Utah on November 13, 1998 when her card was clocked in at 8:36 a.m.

102. Mrs. Nielson has represented to others that Mrs. Singer is dishonest.

103. Mrs. Nielson's defamatory and slanderous name calling of Montezuma Creek Health Clinic employees and plaintiffs' witnesses was reported on the radio.

104. Mrs. Nielsen told Mr. Dickson to cut his hours back to 32d and reminded him his position probably "wasn't that necessary". ONLR complaint [attached].

Defendants San Juan Health Service District and San Juan County

105. SJHSD is an alter ego of San Juan County.

106. San Juan County commissioners were members of the San Juan Health Service Board at the time the plaintiffs claims arose in November and December 1998.

107. San Juan County has given SJHSD money.

108. San Juan County has expanded the number of board members from five to six and then to seven.

109. San Juan County attorney held himself out as SJHSD's legal representative on January 19, 1999, due to his authority as a County Attorney.

110. Mr. Halls stated he had no private contracts with SJHSD.

111. Utah Code does not give the County Attorney the authority to represent a special service district with the exception of advising board members of their duties.

112. Utah Code gives authority to a special service district to select their own legal counsel.

113. Mr. Halls was aware, or should have been aware, of the Special District Personnel Management Act in 1992 when it was adopted, or since the statutes adoption.

114. Mr. Halls has a responsibility to enforce the law in San Juan County.

115. Mr. Halls, as representative of San Juan Health Services District, had a responsibility to ensure that the San Juan Personnel and Policies adhered to the NTPEA and Utah Code 17A-2-601 -603.

116. Mr. Halls had a responsibility under Utah code to inform the San Juan Health Service's District's trustees of SJHSD's noncompliance with NPEA and the Utah Special District Personnel Management employment laws.

117. Mr. Halls had custody of Mrs. Singer's records prior to her receipt of them.

118. Mr. Halls had no authority to review Mrs. Singer's personnel file after her termination.

119. Mr. Halls counseled Mr. Wood, and/or SJHSD's employees, board members or their other agents, contractors, and/or other associates concerning Mrs. Singer and her discharge.

120. Mr. Halls counseled Mr. Wood, and/or SJHSD's employee's, board members, or their agents, contractors, and/or associates concerning Mr. Riggs and his discipline.

121. Mr. Halls never informed SJHSD Administrative Control Board that 'at-will' employment is illegal for a special district with revenues over $50,000.

122. Mr. Halls never informed San Juan County of SJHSD's noncompliance with NPEA and/or the Utah Codes.

123. SJHSD'S Administrative Control Board has a fiduciary responsibility to the taxpayer's of San Juan County.

124. SJHSD's Administrative Control Board has a fiduciary responsibility to the Navajo patients it serves.

125. SJHSD Administrative Control board had an obligation not to hear, or discuss, review plaintiffs' exhibits that was given to the San Juan County Commissioner's Redd and Maryboy and Mr. Halls without the plaintiff's presence.

126. SJHSD has a responsibility to respond to Government Records Access Management Act requests.

127. SJHSD has a responsibility to discipline employees in a uniform and unbiased fashion.

128. SJHSD's Administrative Control Board has a responsibility to know the law and follow it

129. SJHSD's Administrative Control Board violated the NPEA and the Utah Code when it adopted its Personnel Policy and Procedures from 1993 forward.

130. SJHSD is not structured in accordance with Utah Code.

131. San Juan county is accountable for all the actions of SJHSD.

132. San Juan county has a responsibility to enforce the law.

133. San Juan county was aware of statutory violations and took no actions against the SJHSD.

134. San Juan County can withdraw SJHSD's delegated powers.

135. San Juan County was aware of contractual violations by SJHSD and took no formal actions to bring SJHSD into compliance.

136. SJHSD organization resolution of 1988 prohibits county commissioners from sitting on its administrative Control Board. Exhibit 5.

137. SJHSD is supposed to have liability insurance for its board members.

138. SJHSD board members had no liability insurance at the time the plaintiff's claims arose.

139. San Juan county is currently paying for an employee production survey for

SJHSD.

140. San Juan county is currently paying for the legal fees of SJHSD's previous interim CEO, Mr. Bailey.

141. San Juan County is currently paying for SJHSD's legal fees previous legal counsel, Mr. Halls.

142. Mr. Halls has represented to others that Mrs. Singer is not honest.

143. San Juan county is currently responsible for paying SJHSD's legal counsel.

144. San Juan county is paying SJHSD's legal fees.

145. San Juan County Commissioners have a fiduciary responsibility toward the taxpayer's of San Juan County.

146. San Juan County Commissioners are responsible for the repayments to the Utah Navajo Trust Fund.

147. San Juan County Commissioners were acting ultra vires at the time plaintiffs claims arose.

148. SJHSD board members do not accurately represent the racial apportionment for San Juan County in the numbers of Navajos on the board. Exhibit 6.

149. SJHSD does not adhere to merit system principals of the Utah Code 17A-106 through 603.

150. SJHSD has not referenced the Navajo Preference in Employment Act in its personnel policy and procedures manuals.

151. SJHSD has not advertised administrative or other positions on Navajo Nation radio or in the Navajo Nation newspaper.

152. SJHSD has not advertised for Mrs. Singer's replacement in a Navajo Nation paper or a Navajo Nation radio station.

153. SJHSD has not fully accounted for how the UNTF start up funds for Montezuma Creek Clinic were used.

154. SJHSD placed expenses of the hospital on to Montezuma Creek Health Clinic's expense budget.

155. SJHSD knew Mrs. Singer had time card problems for years.

156. SJHSD alleges that Mrs. Singer was responsible for over nearly all others employees' time cards at Montezuma Creek Health Clinic.

157. Mrs. Singer apologized for making her time card mistakes. Exhibits 27,28, and 32.

158. SJHSD, through its administrator Mr. Wood wanted to make Mr. Riggs responsible for nearly all of the Montezuma Creek Health Clinic personnel's time cards.

159. SJHSD, through its administrator Mr. Wood wanted to make Mr. Riggs responsible for nearly all of the Montezuma Creek Health Clinic personnel's time cards.

160. Mr. Riggs is one of the most valuable employees at Montezuma Creek Health clinic. Exhibits 52, and 53.

161. Mr. Riggs had received a pay raise granting him additional compensation for his bilingual duties at Montezuma Creek Health Clinic. Exhibit 53.

162. SJHSD knew Mr. Riggs had no training on time cards.

163. SJHSD's Personnel Policy and Procedures mandate training and orientation of employees. Exhibit 63.

164. SJHSD has a time card policy that does not indicate discharge is the remedy for. mistakes. Exhibit 58.

163. SJHSD changed the progressive discipline policy to be in the supervisor's discretion in 1995 Exhibit 62.

16& SJHSD was under a fiduciary obligation to be sensitive to the special conditions of the Indian populations it serves at Montezuma Creek Health Clinic and Monument Valley Clinic. Exhibit 11.

167. SJHSD violated the cultural sensitivity portion of their Indian Health Service contracts. Exhibits 9,10, and 13.

168. SJHSD has failed to meet its fiduciary responsibilities of their UNTF contract Exhibits 7,8,9,13,14,15, and 16.

169. SJHSD ignored the Aneth and Red Mesa resolutions to reinstate Mrs. Singer and Mr. Riggs. Exhibit 1.

PLAINTIFFS' CLAIMS

The Right to Free Speech as protected by the Navajo Nation, the United Nations, and the United States.

170. All facts so stated above will bee incorporated herein.

171. Mr. Riggs, Mrs. Singer, and Mr. Dickson all spoke out in order to notify a supervisor or board of an illegal or potentially illegal act Exhibits 17,64,65,60, and 57.

172 Mr. Riggs spoke out about discrimination and had a promotion withdrawn. Exhibit 45.

173. SJHSD refuses to remove their fallacious charge from Mr. Riggs file.

174. SJHSD refuses to remove their fallacious charge from Mrs. Singer's file.

175. SJHSD refuses to hire Mr. Dickson as a regular employee.

176. Mr. Riggs was punished for charging Mr. Wood with discrimination. Exhibit 45.

177. SJHSD Personnel Policies and Procedures prevent any recriminations to employees for grieving. Exhibit 54.

178. It is against the law to threaten, coerce, or restrain in any manner a person who may testify about discrimination.

179. Mr. Singer spoke out about private hospitals coming into Blanding and was criticized and labeled as

and 'enemy' to the hospital a liar and a cheat and evil. Exhibits 17, and 64.

180. Mr. Dickson spoke out about the CIB policy and Mr. Woods reference liking it to a 'dog tag' and has not been given his fall time employee status. Exhibit 57.

181. Plaintiffs Navajo witnesses have been threatened with having their employment positions moved eighty or so miles away to Monticello for reporting Mrs. Nielsen and Mr. Woods racially insensitive and derogatory comments.

182.. The right to speak freely is a property interest that is protected and justifies compensation when taken under Navajo custom and traditions and law.

183. Navajo law provides greater protections for free speech than the State of Utah or the United States government

Freedom to Assemble as Protected by the Navajo Nation, the United Nations, and the United States

184. All facts so stated above are incorporated herein.

185. Mrs. Singer has been spoken to in sharp and/or condescending tones twice, by Mr. Wood, for attending Navajo chapter meetings on her own time.

186. Mrs. Singer has been told by Mr. Wood that she was in the wrong place when she was attending public board meetings.

187. Mr. Wood told the Montezuma Creek Clinic employees they were not to talk to Mr. Riggs and Mrs.

Singer when Mr. Riggs and Mrs. Singer were put on administrative leave.

188. Mrs. Singer has not attended SJHSD board meetings since her December 1998 dismissal.

189. Dr. Jones has been spoken to in harsh, angry condescending tones for his association with Mrs. Singer.

190. The right to freely assemble is part of the right of a person to seek redress in their community for injuries they have suffered.

The right to Due Process protected by the Navajo Nation, United Nations, and the United States

191. All facts so stated above are incorporated herein.

192 That the San Juan Health Service District has denied Mrs. Singer, Mr. Riggs, and Mr. Dickson of their due process rights by acting in a manner that is contrary to the applicable Personnel Policies and Procedures of the San Juan Health Services District; the Navajo Preference in Employment Act the Navajo Bill of Rights; the United States, and/or the applicable Utah Merit System act of the State of Utah. Exhibits 4,21,22,59,62. Mrs. Singer and Mr. Riggs

193. SJHSD denied the plaintiffs their right to a pre-discharge and pre-disciplinary hearing with her supervisor. Exhibit 59 and 19.

194. SJHSD denied plaintiffs their right to identify and be confronted by their accuser.

195. SJHSD denied plaintiffs their right to present evidence and compulsory witnesses on their own behalf, and,

196. SJHSD denied plaintiffs their right to know ahead of time what charges, evidence and witnesses will confront them and,

197. SJHSD denied plaintiffs their right to have a fair and impartial hearing officer decide the matter of the allegations made against them.

198. SJHSD denied plaintiffs their right to have a clear and unequivocal statement of the charges upon which Mrs. Singer's discharge, and Mr. Riggs' discipline and RIF pay cut; and Mr. Dickson's non permanent status, is based. Exhibits 34, 35, 36, and 48,49, and 50, and 51.

199. SJHSD's charges against Mrs. Singer and Mr. Riggs involve 'misconduct' which is a charge involving willfulness. Exhibit 36 and 37.

200. SJHSD failed to clearly and unequivocally 'warn' the plaintiffs. Exhibit 26.

201. SJHSD had no authority to charge Mrs. Singer with time card fraud, misconduct, or violations, for time

Exhibit 38.

202. SJHSD had no authority to charge Mr. Riggs with time card fraud, misconduct, or errors or any other issue with time cards due to his nearly twenty three years of being FSLA exempt, even at the time administered. .

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203. SJHSD never gave Mr. Riggs a letter stating the just cause for putting Mr. Riggs on of time cards. Exhibit 46.

204. SJHSD could have corrected Mr. Riggs and Mrs. Singer's problems by simply taking them off of time cards, as indicated in the San Juan Personnel Policies and Procedures. Exhibit 62.

205. SJHSD denied the plaintiffs their right to a clearly enumerated list of evidence upon which the discharge and discipline and failure to reinstate or make them whole are based.

206. SJHSD denied the plaintiffs their right to a hearing panel that is not inherently structurally flawed nor tainted.

207. For Mr. Dickson to grieve Mr. Woods action he would have to first grieve to Mr. Woods who already purposefully misrepresented Mr. Dickson's work history to Mr. Bailey, Exhibit 51.

208. Mrs. Singer grieved her discharge. Exhibit 44.

209. SJHSD denied the plaintiffs their right to a timely hearing and timely decision. Exhibit 62.

210. SJHSD denied the plaintiffs their right to a decision with clearly stated the unambiguous facts upon which administration relied and their conclusions of law.

211. SJHSD denied the plaintiffs their right to have the burden of proof of their 'fraud' allegation rest with the accuser, rather than San Juan Health Services District

placing the burden of proving their innocence upon the plaintiffs.

212. SJHSD denied the plaintiffs their right to have and expect employment policies to be carried out in an impartial and uniform manner throughout the employees of the San Juan Health Services District Exhibit 59.

Mr. Dickson

213. SJHSD denied the plaintiff Mr. Dickson's right to any type of a fair and impartial hearing to be given his permanent full time status, as evidenced by all the above violations by the defendants and Mr. Wood's statement referencing that since no action was taken, there was none to grieve. Exhibit 51.

214. SJHSD denied Mr. Dickson's right to any type of impartial hearing officer, as the person denying him his permanent status is now the CEO of San Juan Health Services District.

Wrongful Hiring

215. All facts so stated above are incorporated herein

216. San Juan County, acting by and through its alter ego, SJHSD, when it hired Mr. Wood without a thorough SJHSD Administrative Control Board interviews of Mr. Wood, did initiate the eventual harm perpetrated upon the employees.

217. But for the hiring of Mr. Wood, the employee plaintiffs may never have been harmed.

218. The burden of the SJHSD Administrative Control Board with fiduciary duties to taxpayers, employees, and patients to ask probing and investigative questions prior to hiring, including examining the person's experience in dealing with Native Americans, is not overly burdensome.

219. San Juan County and SJHSD had a responsibility to examine Mr. Wood's background from other sources than Mr. Woods.

220. Mr. Wood during the previous fifteen (15) years of work prior to coming to SJHSD had no experience with Indian Health Service contracts, and the Yavapai and Apache who lived within 20 miles of the Marcus J. Lawrence Hospital Mr. Wood previously managed, had to travel 120 miles for clinic and hospital needs.

Defamation and Tortuous Interference with Future Contractual Relations

221. All facts stated above are incorporated herein.

222. The fraud charges have banned Mr. Riggs and Mrs. Singer's reputation.

223. Charges of criminality such as fraud are presumed at law to cause harm.

224. There are people who have known Mrs. Singer for many years who now have grown suspect that Mrs. Singer is a 'liar and a cheat', of the further evidences the harm such scurrilous charges have caused Mrs. Singer.

225. Her health deteriorated from the stress of having gone through such a vicious discharge, to the point of

where she almost died and has had infections that were difficult to overcome. Exhibit 41.

226. Mr. Wood has defamed Mrs. Singer by calling her the 'enemy' to other employees with the SJHSD.

227. Mr. Wood has defamed Mrs. Singer by viscously attacking her as 'evil', involved in 'cancerous' activities, as being a 'liar and a cheat', among other names, to other employees in SJHSD.

228. Mr. Riggs has suffered from having a fraud allegation on his previously 23 year flawless record.

229. Mr. Dickson has suffered personal embarrassment from being labeled rebellious and insubordinate and having this label published in the newspaper.

Theft claims

230. All facts stated above are incorporated herein.

231. A theft occurs when things, that people have property rights to are taken, or used without permission, for a special purpose without compensation.

232. Mrs. Singer and Mr. Riggs had their reputations taken and all the Plaintiffs had their speech taken in violation of Article 12 of the United Nations Declaration of Human Rights. Exhibit 4.

233. Based on the foregoing facts, Mrs. Singer and Mr. Riggs' reputations

a) were taken by charging them with fraud,

b) For the public purpose of stopping time card errors in a government tax funded entity [a public purpose],

c) Without compensation to the plaintiffs for the taking of their reputations

d) Under Navajo customs and traditions, a person's words, good name, and reputation is a protected property interest.

234. Based on the foregoing facts, Mrs. Singer and Mr. Riggs' and Mr. Dickson's right to freely speak or their 'words' were taken by arbitrary and capricious acts by a Utah government political subdivision, and meted out to them under the color of their apparent authority.

235. The plaintiffs' reputations and speech were taken or stolen and used for the illegal public purposes of a. being able to conduct SJHSD business without being questioned, criticized, or informed of possible SJHSD illegalities and b. not having Mrs. Singer or Mr. Riggs compete against SJHSD if they should try to find work elsewhere.

236. SJHSD gave the plaintiffs no compensation for using them as an example, or for sacrificing their good names and reputations.

237. SJHSD's manual as approved by the SJHSD Administrative Control Board, has

a) Discretionary discipline; Exhibit 19.

b) At will discharge; Exhibit 20.

c) At will employment Exhibit 18.

238. SJHSD never informed Mr. Wood of the merit system established for SJHSD in 1992.

239. Mr. Halls, specifically, never informed San Juan county, San Juan District, or Mr. Woods that a merit system existed under Utah Code or the NPEA under Navajo Nation law applied.

240. Others SJHSD employees feared to speak out as a result of SJHSD administrators acts, and SJHSD-Administrative Control Board's tacit approval of SJHSD's actions, and San Juan County's lack of protection for their rights, creating an intimidating and hostile work environment.

241. Mr. Wood never inquired into the applicability of a merit system applicable to San Juan County.

242. The United Nations Declaration of Human Rights supports the precepts of earning a living freedom and not having one's reputation injured.

The Right to Equal Protection Specifically Protected by the Navajo Nation, the United Nations, the United States

243. All facts so stated above are incorporated herein.

244. SJHSD denied plaintiffs fundamental equal protection rights under the Navajo Bill of Rights, Navajo Custom and Traditions, San Juan Health Service District's contracts with Indian Health Service, Medicaid, and Medicare, and the Navajo Preference in Employment Act, United Nation Declaration of Human Rights, United States Bill of Rights, federal regulations and Utah's Constitution and statutes, as they were obliterated when the defendant's acting under color of

law treated Montezuma Creek Health Clinic employees and Navajo Nation patients differently than others.

Discrimination as part of art ongoing patient

245. Plaintiffs claim they were denied Equal Protection of the laws that protect them as part of a pattern of discrimination that negatively effects the SJHSD facilities, employees, patients situated within the 'Indian Country'.

246. San Juan County, by and through its alter ego, SJHSD, has not implemented a cross cultural training program for non-Indian administrators, supervisors, or managers as required by the NPEA.

247. San Juan County, by and through its alter ego, SJHSD, as an employer on or near the Navajo Nation, has failed to advertise SJHSD administrative positions to Navajos according to the NPEA requirements essentially eliminating Indians from the prospective employment pool.

248. In the November, 1998 medical staff meeting, Mr. Wood, acting in his official and private capacity, did generally represent to the doctors present that they did not want a private hospital coming into Blanding, Utah because it was being run by a little Arab and he would bring in 'Arab doctors, and their families' and then there would be 'east Indians' running around the County and the doctors did not want that.

249. In a January 5, 1999, staff meeting at Montezuma Creek Health Clinic in the presence of four Navajo billing clerks 91) Mr. Wood, acting in his official and private capacity, asked if 'CIBs' (Certificate of Indian Blood) were like 'dog tags', and (2) Mary Nielsen, in her

official and private capacity, said it was better patients did not get treated than SJHSD no get paid, and (3) no Indians without their 'CIB' on file or on their person would receive treatment

250. That medical care and service entitlements were "prepaid" by Navajo and other Native American peoples, band, and tribes as a matter of treaty.

251. That Mr. wood has stated to the effect "that there is no hospital no clinic; not one, where a person can go to and receive treatment without providing a means of payment" as justification for implementing the CIB policy.

252. The Navajo billing clerks attesting to the CIB policy statements had their positions threatened with removal to Monticello Hospital, approximately 80 miles away, by Mrs. Nielsen, acting in her official and individual capacity, at a January 19998 SJHSD board meeting.

253. Mrs. Nielson acting in her official and individual capacity, stated she "got mad" when her words were used back against her at the same time she threatened the Navajo billing clerk positions.

254. SJHSD implemented the 'CIB policy' whereby persons without their 'CIB' medicare or medicaid proof of eligibility, are to be denied treatment except in a 'true emergency or ob'.

255. The CIB policy' often leaves determining a 'true emergency' to a non medical personnel to determine if a Doctor or Physician's Assistant should be called in to treat a person, or they be turned away.

256. The 'CIB policy' is in violation of federal regulations.

257. Mrs. Nielson, acting in her official and individual capacity, publicly labeled the Navajo billing clerks who documented her racially insensitive remarks in the January 5, 1999 staff meeting, 'rebellious' and 'insubordinate' for not posting the 'CIB policy sign.

258. Mrs. Nielsen never sent the CIB sign to Montezuma Creek Clinic, requested by a Montezuma Creek Clinic billing clerk to Montezuma Creek Clinic, making compliance with her orders to post the CIB policy impossible.

259. Mrs. Nielsen's labeling of the billing clerks as 'rebellious' and 'insubordinate' in public SJHSD board meeting was published in the newspaper in San Juan County.

260. The CIB policy signs posted at SJHSD's Monument Valley facility are primarily in the English language.

261. Many Navajos visiting the SJHSD clinics to Montezuma Creek and Monument Valley clinics have not had the educational opportunities to learn to read, much less read English.

262. A 'CIB number' is not the same as Beneficiary Identification Card per 42 CFR § 36.16.

263. IHS regulations prohibit denial of treatment to an otherwise eligible Indian who lacks his/her proof of IHS eligibility.

264. The policy, appearing facially neutral, has an enormous disparate impact upon the Navajo due to the great distances and poor roads within the Navajo Nation and a greater reliance on tribal rather than federal identification records.

265. The CIB sign insisted upon by SJHSD administration does not meet Medicaid sign requirements.

266. On February 12, 1999, Mr. Riggs, in the presence of interim SJHSD

267. CEO/Executive Director /San Juan county Administrative Aide Mr. Bailey, explained the disparate impact of SJHSD's 'CIB policy' with an example of a small child with an ear ache who may not have a life threatening emergency, but if the child is not treated and the parents have expended all their resources to get to the clinic, including possibly hitch hiking many miles over rough roads, then by the time the child gets back home, the child may have meningitis or other serious disorder, and the parents will have no way to get back to the clinic. Mr. Wood responded by accusing Mr. Riggs of assuming that Navajos were not 'responsible' [to bring their 'CIB' with them], whereas he, Mr. Wood, believed they would be just as 'responsible' as anyone else. Mr. Wood's response to Mr. Riggs' example focused on the 'CIB' necessity of payment, rather than the disastrous disparate impact the 'CIB policy' has on an innocent child when parents, being human, may sometimes forget identification, or not have a 'CIB' and be under extreme hardship just to get to the clinic, notwithstanding the inconvenience of obtaining the irrelevant identification of the 'CIB'.

268. That SJHSD board promoted Mr. Wood, after being made aware of plaintiff's claims, by making him permanent SJHSD CEO two months earlier than his six months initial probation period

269. SJHSD promised Dr. Walker, at Monument Valley Clinic, also within the Navajo Nation boundaries, a computer to place patients names and enrollment numbers and other eligibility information on, and as of this date, SJHSD has not so provided him with one, thus hampering his ability to determine eligibility for the 'CIB policy'.

270. The firing of the PA's in the November 1998 fallacious RIF has prevented a PA from serving at Monument Valley, and therefore preventing Monument Valley from being able to have Medicaid certification, and limits the numbers of patients being seen at that clinic.

271. Approximately $40,000 of the approximately $350,000 of Navajo money held in a fiduciary relationship within the Utah Navajo Trust Fund, has not been accounted for in SJHSD public board meeting records.

272. Expenses of Monticello Hospital show they were transferred to Montezuma Creek Health clinic, but not Blanding, Utah or Monument Valley, Navajo Nation facilities, as administrative costs on published financial reports.

273. IHS contracts call for equal treatment facilities for Navajos.

274. Covertly shifting expenses of Monticello Hospital to the Montezuma Creek Health Clinic can make SJHSD

appear to be spending more per Navajo patient than without these expenses, being false and misleading to the Indian Health Service office.

275. SJHSD expenses for Montezuma Creek listed as 'other professional fees' have to been accounted for.

276. SHJSD expenses for professional recruitment costs for starting up Montezuma Creek have not been accounted for in detail

277. The Utah Navajo Commission directed Mr. Wood to make art accounting to it for moneys spent on the clinic and Mr. Wood, in his official and individual capacity, chastised the Commission for saddling him with such and obligation, even though he previously had agreed to wok with the Utah Navajo Commission to assist the Navajo Nation in taking over the Montezuma Creek Health Clinic.

278. Mr. Wood, in his official and individual capacity, on two separate occasions chided Mrs. Singer for attending Navajo meetings, even though Mr. Wood had previously terminated her.

279. Mr. Wood, acting in his official and individual capacity, ordered the staff not to speak to Mrs. Singer, and at the time, Mr. Riggs, when he placed them on administrative leave for time card fraud charges.

280. Mr. Wood has angrily, and vehemently, on two different occasions, chastised Dr. Jones for associating with Mrs. Singer on company time, when Dr. Jones and Mrs. Singer attended the Utah Navajo Commission public meeting they were invited to attend on March 10,1999.

Intentional and Negligent Infliction of Emotional Distress

281. The facts so stated above are incorporated herein.

282. SJHSD has broken statutes.

283. SJHSD is breaking statutes.

284. SJHSD has shown no sympathy or concern for Mrs. Singer's and the other plaintiffs emotional well being.

285. SJHSD has shown callous disregard for plaintiffs rights.

286. SJHSD has not disciplined Mr. Riggs with common sense or respect for him as a person.

287. SJHSD has not discharged and otherwise disciplined Mrs. Singer with common sense or respect for her eighteen years of honest labor.

288. SJHSD has not treated Mr. Dickson with common sense or respect for his efforts to learn how to be self supporting.

289. SJHSD has called people defamatory names, flagrantly flouted their treatment of Mr. Riggs and Mrs. Singer causing them great emotional distress and public humiliation

290. A reasonable person within the Navajo Nation would consider the treatment by SJHSD of plaintiffs as intentional and overly harsh to the point of causing emotional distress and public humiliation.

291. Mr. Wood intended to harm Mrs. Singer and Mr. Riggs to make them and the system change.

292. Mr. Wood's vicious and slandering name calling has upset those plaintiffs suffering the brunt of it.

293. Mr. Wood has entered onto Montezuma Creek Health Clinic and vehemently and heatedly yelled at Dr. Jones for associating with Mrs. Singer, which has caused the entire staff, including the plaintiffs, emotional distress for cause of working in such a hostile environment.

294. SJHSD's termination has caused the local Navajo chapters and other SJHSD employees distress and concern over the welfare of Montezuma Creek Health Clinic.

295. SJHSD's implementation of a 'CIB policy', among people who are very sensitive and aware of the hardships pertaining to many Navajos and other Native Americans in traveling to the clinics in the Utah Strip, has caused and is causing emotional distress for the plaintiffs.

296. Mrs. Singer has been physically ill from the stress she has suffered.

Violation of Fiduciary Duties

297. All facts stated above are incorporated herein.

298. SJHSD as an agent of Indian Health Service and a contractor with the UNTF has fiduciary duties to the Navajo Nation.

299. SJHSD has violated those fiduciary duties.

300. SJHSD has an obligation to respect uphold, and enforce Navajo Nation Labor laws.

Misfeasance fn3

301. All facts stated above are incorporated herein.

301. San Juan County is responsible for all of SJHSD's actions.

302. San Juan County at all times herein acted within its authority.

303. San Juan County has the ability to withdraw authority from SJHSD if SJHSD is breaking the laws and did not do so.

304. San Juan County Attorney has proclaimed his authority to legally represent the SJHSD.

305. No Statute authorizes the County Attorney to represent the SJHSD.

306. San Juan County Commissioners Redd and Maryboy withdrew from the SJHSD board after being informed of possible statute violations.

307. San Juan county Commissioners had a duty to assure that SJHSD obeyed the law.

308. San Juan Health Service District Administrative Board has a responsibility to diligently research

a) The background and credentials of the SJHSD CEO; and,

b) The claims of employees of statute violations; and,

c) Grieving employees claims and evidence; and,

d) Claims of unequal treatment of employees and patients; and,

e) Claims of misrepresentations by SJHSD's administrators and,

f) Claims of mis-allocations of funds, among other areas of investigation.

309. San Juan Health District Administrative Board;

a. Did not adequately investigate or interview Mr. Woods prior to his hiring; and,

b. Did not impartially investigate the claims of grieving employees of statute violations and racially oriented remarks of Mrs. Nielsen; and,

C. Did discus, ex parte, in the January 1999 SJHSD Administrative Board Meeting Executive Sessions the grieving employees' documents and evidence previously presented to the San Juan County Commissioners/SJHSD trustees and County Attorney on January 19,1999; and,

d. Did entertain comments and information of the SJHSD administrators in executive session, about the grieving employees claims and grievance meetings, in executive session, without the grieving employees being present; and,

e. Did acknowledge SJHSD's lack of compliance with their Indian Health Insurance contracts; and,

f. Did not impartially hear, discuss, or review the grieving employees claims; and,

g. Tainted all future grievance proceeding; and,

h. Promoted an administrator, Mr. Wood, to permanent status when the grievances had not been concluded, among other acts that may be identified through discovery.

Malfeasance fn4 in Office

310. All the above facts are incorporated herein.

311. San Juan County Commissioners were members of the SJHSD Administrative Control Board in direct contradiction to the SJHSD's organization resolution section 8.

312. San Juan County Commissioner's took steps to purposefully avoid taking responsibility for the SJHSD's acts.

313. There is no statutory authority for Mr. Halls to represent the SJHSD.

314. Mr. Halls has a responsibility to make sure County entities obey the law.

315. Mr. Halls purposely avoided any responsibility for SJHSD's actions after being appraised of their violations of statutes on January 19, 1999.

316. San Juan County Attorney advised the SJHSD in the matter of the plaintiffs' claims; and,

317. San Juan County has assisted SJHSD and/or its agents, employees, etc. in circumventing the law.

318. San Juan County's Administrative Aide Mr. Bailey had no legal authority, in his capacity as the San Juan county Commissioner's Administrative Aide, to be the CEO of SJHSD, as part of his Administrative Aide duties,

319. Mr. Bailey sought out Mr. Wood as the CEO of SJHSD.

320. Mr. Bailey was the grievance meeting officer, when in fact there was no position of 'executive director' as referenced in the SJHSD Personnel Policy and Procedure manual.

321. Mr. Bailey knew Mr. Woods made material misrepresentations to him and did not inform the SJHSD Administrative Control Board.

322. Mr. Bailey knew Mr. Woods made material misrepresentations to him and did nothing to inform the San Juan County Commissioners.

323. Delete [same as 322]

324. At all times herein, the defendants were acting outside their color of authority.

325. Mr. Bailey was operating as interim CEO without a job description as required under NPEA.

326. Mr. Bailey issued grievance decision letters for Mrs. Singer and Mr. Riggs

a) without clear charges,

b. without clearly identified evidence to justify Mr. Woods' actions,

c. without mentioning NPEA and,

d. without referencing the mandates of Utah's Special District Personnel Management Act among other acts.

327. Mr. Bailey, by and through the Commissioner's authority, by doing little or nothing to rectify the claims of the plaintiffs has endangered the financial well being of SJHSD, and the public safety, health and welfare of the Navajo Nation surrounding Montezuma Creek Health Clinic.

328. San Juan County had an obligation to investigate the finances of SJHSD by hiring an objective, outside, neutral auditor to ensure SJHSD was obeying the law.

329. Courts have found schools and juries in San Juan county to be discriminatory.

330. Government entities in San Juan County have prolonged litigation for decades in various suits.

331. 331 Mr. Wood has defiled the reputations of innocent employees by charging them with fraud, without any evidence.

332. Mr. Wood did not investigate and thoroughly read Mrs. Singer's or Mr. Riggs' time cards.

333. Mr. Wood took Mrs. Nielsen's word for Mrs. Singer's and Mr. Riggs' 'fraud'.

334. SJHSD recruited and sought to hire Mrs. Singer's replacement prior to her February 12, 1999 grievance meeting.

335. SJHSD wrongfully prolonged the administrative proceedings for plaintiffs' claims long after the period intended in the SJHSD Personnel Policies and Procedures.

336. SJHSD's Administrative Control Board has purposely not informed themselves of the laws that control them in order to act in any manner they so choose.

337. SJHSD has not obeyed their counsel's advice.

338. SJHSD is not an at will employer.

339. SJHSD has misrepresented the employer status of SJHSD to the SJHSD employees.

340. SJHSD withheld the SJHSD Personnel Policy and Procedure manuals subsequent to 1993 FROM THE State department of licnesure.

341. SJHSD violated NPEA by not so much as mentioning it in any of its administrative documents and/or Personnel Policy and Procedure manuals.

342. Mrs. Shafer knew Mrs. Singer was not a dishonest person and did nothing to help her.

343. Mrs. Shafer knew Mr. Wood's charge of fraud for Mr. Riggs and Mrs. Signer was false.

344. Mrs. Shafer could have helped provide a pre-discharge and pre-discipline hearing for Mrs. Singer and Mr. Riggs, but did not.

345. Mrs. Shafer acted in concert with Mr. Woods and Mrs. Neilsen to harm the defendants, as in the aforestated claims.

346. At all times herein, the defendants acted under color of authority.

347. Mr. Woods refused to give Mr. Allison Dickson his full time permanence employment status.

348. Mr. Woods made material misrepresentations to SJHSD and his superior. Supplemental Claims

349. The plaintiffs supplemental claims do not supplant the original claims.

350. The plaintiffs add the assertions of:

a. Obstruction of Justice; and,

b. Misuse of Judicial Process; and,

c. Defamation per se; and,

d. Denial of Due Process; and,

e. Denial of Equal Protection; and,

f. The endangerment of Navajo patients at Montezuma Creek Clinic as en addition to their claims.

Injuries Arising Since the Filing of the Original Pleadings

351. These assertions are base upon the court's Findings of Fact in the Court's Preliminary Injunction Order issued on the 28th day of December, 1999.

352. The Court's factual findings therein pertaining to the defendant's counsel including the now named defendants of Farmer's Insurance Companies and Truck Insurance Companies, Dennis Ickes':

a. misrepresentations of fact and law to the Court, and,

b. spoilation/destruction and sandbagging of evidence; and,

c. violation of Rule 9 That require specific pleadings and legitimate and valid proofs in issues of fraud; and,

d. intentional and malicious disruption of operations and services of the Montezuma Creek Health Clinic.

Facts, common to all allegations that are aforesaid stated, are directly attributable to the arbitrary, capricious acts that were in done in the defendant's official and personal capacities, jointly and severally, and were wholly and abuse of discretion, that have and is causing serious, substantial and irreparable harm to the plaintiffs.

PRAYER FOR RELIEF

WHEREFORE, now having fully stated their cause(s) of action herein as against the defendants, and each of them, both jointly and severally, and each sued in their official and individuals capacities as aforestated, with the exception of Mark Maryboy and Patsy Shumway

claims against her), who are sued in their official capacities only, the Plaintiffs would pray for judgement against each defendant as such as follows:

1. Reinstatement of Mrs. Singer to her merit position of employment as manager of the Montezuma Creek Health Clinic; and,

e. Reinstatement of Mrs. Singer's benefits and seniority; and,

f. Reinstatement of Mr. Riggs' to his previous position; and,

g. Reinstatement of back pay and benefits and seniority status; and,

h. Make Mr. Dickson a full time employee with all benefits; and,

i. Expungement of all disciplinary actions taken against the plaintiffs, and non hiring action from their files; and,

j. Back pay, and benefits reinstated as if they had never ceased; and,

k. A public apology in SJHSD board meeting by each defendant individually and specifically for the pain and suffering each has caused them by their actions or inactions; and,

l. A published refraction of all derogatory comments and allegations made against them and all Montezuma Creek employees in at least three newspapers of general publication;

m. Money damages of $3,000,000 (three million) for the aforesaid injuries to Mrs. Singer.

n. Money damages of $3,000,000 (three million) for the aforesaid injuries to Mr. Riggs; and,

0. Money damages of $3,000,000 for the aforesaid injuries to Mr. Dickson; and,

p. Immediate notification and orientation for the SJHSD employees of their rights and protections under a merit system; and,

q. Immediate and future adherence to a merit system in San Juan County and SJHSD, including the setting up of a merit system; and,

r. Proportionate representation on the SJHSD for Aneth and Red Mesa chapters commensurate with the population of Navajos living in the San Juan county boundaries; and,

s. Adhere to all provisions of the NPEA, including advertising within the Navajo Nation for all administrative and managerial positions that will have some direct impact upon the Navajo Nation; and,

t. Payment of the damages over a period of time in a schedule of payments and in such a manner to the appropriate trusts of the plaintiffs as approved by the Court.

REQUEST OF PUNITIVE DAMAGES

Plaintiffs believe San Juan County has a proven record of racial discrimination in schools and juries and misusing litigation to draw cases out for as long as

approximately twenty years, and that their treatment of the plaintiffs is part of this pattern; and,

18. Plaintiff's request another $3,000,000 for each plaintiff (or other amounts as the Court sees fit) in punitive damages to stop San Juan County's treatment of Navajo Nation members with unequal treatment, contrary to contracts and law, within San Juan County and the Navajo Nation; and,

19. Plaintiffs request the payment of damages and punitive damages from the following assets in descending order;

a. Assets of Mr. Wood, Mr. Bailey, MS. Shafer, Mr. Halls and [delete Mary Nielsen] including arty homeowners liability Insurance that may be applicable; and next,

b. Exhausting relief from San Juan County's liability insurance carrier, and then next

c. Payment of punitive damages is derived from other sources.

SUPPLEMENTAL PRAYER FOR RELIEF

20. The plaintiffs add the following prayer for relief, referencing back to the original prayer for relief, and not supplanting the original prayer for relief

21. The plaintiffs pray

a. That each of the defendants, both jointly and severely, be ordered to pay damages to the plaintiffs in the amount of $18,000,000.00 USED (Eighteen Million Dollars); and,

b. That each of the defendants, both jointly and severely, be ordered to pay additional damages to the plaintiffs pursuant to 7 NNC 701 in the amount of $6,000,000.00 USED (Six Million Dollars) to be paid directly to Montezuma Creek Clinic to be used as the management of Montezuma Creek Clinic sees fit in the best interest of the Native American People, and now be used for employment compensation or to take the place of the insurance payments made in behalf of the Native American patients, without express authority of this Court; and,

c. That the defendants, and each of them, jointly and severely, publicly retract all defamatory or other libelous statements made of any of the plaintiffs or other litigants or counsels herein, by publication in the local newspapers, and radio stations of local circulation to Montezuma Creek Health Clinic and the places of residence of each of the plaintiffs, and the general coverage of the Navajo Nation, retracting any and all statements made in respect to any of the plaintiffs herein, and issuing statements of apology which are deemed appropriate by this Court and the plaintiffs by prior review and,

22. The Court grant such other and further relief as the Court deems fit and proper within the bounds of Navajo Customs and Traditions of fairness and justice.

REQUEST FOR A SPECIAL MASTER

1. Plaintiffs request the extraordinary relief of the Labor Commission appointing a special master in order to protect the employment rights of the Montezuma Creek Clinic employees and possibly the Monument Valley Clinic 9 also serving the Navajo Nation) based upon

1. San Juan County's, by and through their alter ego SJHSD, intentional disregard and disinterest in protecting the rights of the SJHSD employees at Montezuma Creek and,

2. The Navajo Nation's requirement to respect the resolutions of the Aneth and Red Mesa chapters; and,

3. The Navajo Nation's responsibility to provide for continued stable health care in the areas served by Montezuma Creek Health Clinic in compliance with Navajo law, IHS contacts and mandates, federal law, and state law and,

4. to protect the lives, health and welfare of the tribal members of the Navajo Nation.

22. Based on the foregoing Plaintiffs also request a fine or sanction that

a) San Juan county, acting by and through its alter ego, will immediately pay back the amounts owing the Utah Navajo Trust Funds that have not been paid to date with market interest rates compounded daily for the time the San Juan county, through their alter ego SJHSD has appropriated these moneys unto themselves to the detriment of the Trust held for the Navajo Nation; and,

b) for the breach of fiduciary duty of San Juan County, by and through its alter ego, SJHSD, an Indian Health Service contractor with a fiduciary duty to care for the Navajos who have already paid for their health care in the Treaty of 1868; and,

c) for SJHSD's callous disregard for the poverty stricken, down trodden, condition of health care within the Navajo Nation, an independent sovereign and federally recognized reservation, due primarily to the

historical subjugation of the United States that has precipitated such long standing problems as recognized in federal law.

Sanctions and Fines

Plaintiffs pray for such other and further damages and relief, including, but not limited to such further sanctions, fines, penalties, as the Court feels is necessary and just to protect the health, safety and welfare of the tribal members in the areas of the Navajo Nation.

Exclusion

If the Court deems the plaintiffs' request is appropriate, plaintiffs pray for exclusion of the defendants Mr. Wood, [delete Mrs. Nielsen], and Mrs. Shafer, for all time from coming within the Navajo Nation's territorial boundaries as this Court is authorized under 17 NNC 1901, for endangerment of the public safety and callous disregard for the health and welfare of the Navajo Nation.

CERTIFICATION

Notice of this action is provided pursuant to Rules 4.5 and 65 et seq of the Navaho Nation Rules of Civil Procedure and will be pending before this Court.

So signed and dated this 14 day of March, 2000

Wm.P.Battles, Counsel for the Plaintiffs
William P. Battles
Battles and Associates
Attorney for the Plaintiff
Post Office Drawer 460

Window Rock, Navajo Nation (AZ) 86515
505-871-2525

Susan K Schildmeyer, Utah State Bar No. 7985
Attorney for Plaintiff
11091 S. Shilling Ave. Suite 2452
South Jordan, Utah 84095
(801) 576-0091

"I hereby certify that this is a true and correct copy of the instrument on tile in the District Court of the Navajo Nation"

Clerk, District Court
of the Navajo Nation
Footnotes

fn1 In his official capacity only.

fn2 In her official capacity only.

fn3 "Misfeasance" is the improper doing of an act which a person might lawfully do" 1979 BLACK'S LAW DICTIONARY 902

fn4 "Evil doing ill conduct . . . . Malfeasance is a wrongful act which the actor has no legal right to do, or any wrongful conduct which affects, interrupts, or interferes with performance of official duty, or an act for which there is no authority or warrant of law or which a person ought not to do at all. . . ." 1979 Black's Dictionary 862

CERTIFICATE OF SERVICE

The above-captioned COMPLAINT FOR DAMAGES is hereby personally served upon the following defendants

SAN JUAN COUNTY ATTORNEY
Mr. Craig Halls
297 S. Main
Monticello, Utah 84535

San Juan County Commission
San Juan County Clerk
and to
San Juan County
Mr. Rick Bailey Administrative Aide
297 S. Main
Monticello, Utah 84535

San Juan Health Services District
c/o the secretary of the district
364 West 1st North
Monticello, Utah 84535

Mr. Cleal Bradford
San Juan Health Services District
364 West 1st North
Monticello, Utah 84535

[delete Mary Nielson]

Mrs. Laurie Shafer, PCD
San Juan Health Services District
364 West 1st North
Monticello, Utah 84535

San Juan County Commissioner
San Juan Health Services Board Member and Trustee
J. Tyron Lewis
6771 South Highway 191
Monticello, Utah 84535

Mrs. Karen Adams
San Juan Health Services board member
32 Blue Mountain Drive
Monticello, Utah 84535

Mr. John D. Lewis
San Juan Health Services District board member
97 S. 500 Fast
Monticello, Utah 84535

Mrs. Patsy Shumway
San Juan Health Services District board member
316 W. 300 N.
Blanding, Utah 84911

Mr. Roger Atcitty, Chairman
San Juan Health Services District board member
316 W. 300 N.
Blanding, Utah 84911

San Juan County Commissioner
San Juan Health Services Board member and trustee
Mr. Bill Redd
182 West 100 North
Blanding, Utah 84511

San Juan County Commissioner
Sari Juan Health Services Board Member and Trustee
Mr. Mark Maryboy
P.O. Box 190
Montezuma Creek, Ut. 84535
Mr. Reid Wood
160 East Spring Drive
Woodland Hills. Utah

Mr. It Dennis Ickes
and Farmer's Insurance Exchange
411 W. Araine Way
Centerville, Utah 84010

Truck Insurance Exchange
Farmer's Insurance Exchange
C/O Registration Agent
Rodney L Chugg
1485 E. 3900 S.
Salt Lake City, Utah 84121

Mr. Doug Moeller, Esq.
424 West Broadway
Farmington, New Mexico 87401

No. 02-1445

Supreme Court, U.S.
FILED
MAY 16 2003
CLERK

In The
Supreme Court of the United States

SAN JUAN COUNTY, SAN JUAN HEALTH SERVICES DISTRICT, County Commissioner J. TYRON LEWIS, County Commissioner LYN STEVENS (official capacity only), County Commissioner MANUAL MORGAN (official capacity only), RICK BAILEY, County Attorney CRAIG HALLS, REID WOOD, KAREN ADAMS, ROGER ATCITTY, PATSY SHUMWAY (official capacity only), JOHN LEWIS, LAUREN SCHAFER, TRUCK INSURANCE EXCHANGE and DENNIS ICKES, and as yet unnamed JOHN AND JANE DOES, in their official and individual capacities, jointly and severally,

Cross-Petitioners,

v.

FRED RIGGS, DONNA SINGER, and AL DICKSON,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF CONDITIONAL CROSS-PETITION FOR CERTIORARI OF SAN JUAN HEALTH SERVICES DISTRICT, ROGER ATCITTY, KAREN ADAMS, PATSY SHUMWAY, JOHN LEWIS, REID WOOD AND LAUREN SCHAFER

BLAINE J. BENARD
CAROLYN COX
Counsel of Record
HOLME ROBERTS & OWEN LLP
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 521-5800

Counsel for Cross-Petitioners San Juan Health Services District, Roger Atcitty, Karen Adams, Patsy Shumway, John Lewis, Reid Wood and Lauren Schafer

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STATEMENT OF THE CASE

Cross-respondents' "Statement" and "Restatement of the Case" in the brief in opposition contain numerous factual assertions and arguments that are either not properly cited to, or not supported by, the record.[1] In addition, in connection with their factual assertions, cross-respondents frequently state that the cross-petitioners do not "dispute" the assertions made. While cross-petitioners in fact dispute most of cross-respondents' factual assertions, cross-petitioners will not burden the Court with a specific response to each factual assertion because cross-respondents' arguments are simply irrelevant to the legal issue raised by the conditional cross-petition: whether the court of appeals erred in reversing the district court's dismissal of the claims against cross-petitioners and holding that the Navajo tribal court's subject matter

[1] For example, cross-respondents assert that numerous Native Americans were improperly billed by the San Juan Health Services District for health care services received at either the Montezuma Creek clinic or various off-reservation Health District facilities. (Cross-petitioners in fact dispute that Native Americans entitled to medical care from Indian Health Services ("IHS") received Health District bills for services at on-reservation facilities.) For the proposition that any bills were improper, cross-respondents cite only statutory language which provides that where contract health services are "authorized" by the appropriate arm of IHS, an IHS patient has no liability for payment. This statutory language falls far short of establishing that the Health District improperly billed Native Americans for health care. As cross-respondents' own citation establishes, contract health services must be authorized before the recipient is relieved of the obligation to pay. Thus, the mere fact that Native Americans received bills does not establish that such bills were improper.

jurisdiction must be addressed prior to the issue of cross-petitioners' sovereign immunity from suit in tribal court.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

I. WHETHER THE HEALTH DISTRICT AND SAN JUAN COUNTY CROSS-PETITIONERS ENJOY IMMUNITY FROM SUIT IN TRIBAL COURT WAS NOT DECIDED BY THE COURT OF APPEALS

In opposition to the cross-petition, cross-respondents first argue that the court of appeals has already determined that cross-petitioners do not have sovereign immunity from suit in tribal court. This assertion is incorrect. Cross-respondents rely on a statement from the court of appeals' opinion which rejected one of a number of arguments made by San Juan County cross-petitioners in support of the proposition that the San Juan County defendants had sovereign immunity from suit in tribal court. However, the court of appeals specifically reserved judgment on whether cross-petitioners enjoy sovereign immunity from suit in tribal court, holding only that the issue of subject matter jurisdiction should precede any sovereign immunity analysis. *MacArthur v. San Juan County*, 309 F.3d 1216, 1226 (10th Cir. 2002); P. App. at 22a. For the reasons stated in cross-petitioners' opening brief, the court of appeals' ruling was in error.

II. THE SOVEREIGN IMMUNITY ISSUE IS NOT MOOT UNDER *COOK COUNTY V. U.S. EX REL. CHANDLER*

Cross-respondents next argue that the conditional cross-petition should be denied because of this Court's opinion in *Cook County v. United States ex rel. Chandler*, 123 S.Ct. 1239 (2003). The issues raised in *Cook County* are not relevant to the sovereign immunity defense raised by defendants. *Cook County* addressed whether counties are "persons" subject to suit under the False Claims Act following amendment of the Act to raise the ceiling on damages recoverable from double damages to treble damages, and concluded that counties continue to be subject to suit under that Act. *Id.* at 1249. *Cook County* did not in any way address a county's immunity from suit in a tribal court.

Cross-respondents also cite to *Jinks v. Richland County*, 123 S.Ct. 1667 (2003), for the proposition that a state's authority to immunize its political subdivisions must yield to Congressional enactments. As an initial matter, *Jinks* did not in any way deal with the immunity of a state and its political subdivisions from suit in tribal court. Rather, *Jinks* addressed the validity of 28 U.S.C. § 1367(d), which requires state courts to toll the state statute of limitations on a supplemental jurisdiction claim while the claim is pending in federal court and for a period of thirty days thereafter. In *Jinks*, this Court held that states may not avoid the tolling effect of section 1367(d) through an assertion of state sovereign immunity. In addition, cross-respondents rely on *Jinks* for the proposition that Congress can overcome a state's sovereign immunity, pointing to various Congressional enactments that cross-respondents assert demonstrate Congressional

intent in favor of tribal court jurisdiction. However, as set forth in cross-petitioners' brief in opposition in related case no. 02-1253, cross-respondents' arguments that Congress has authorized tribal courts to exert jurisdiction against non-Indians, and states and their political subdivisions in particular, for any event occurring on a reservation is without merit. Brief in opposition, no. 02-1253 at 13-17.

Cross-respondents also argue that in *Nevada v. Hicks*, 533 U.S. 353 (2001), this Court said that notions of qualified and absolute immunity should not be analyzed at the jurisdiction stage. However, as explained in the cross-petition, sovereign immunity is distinct from the doctrines of qualified and absolute immunity and should therefore be addressed prior to or concurrently with the issue of tribal court subject matter jurisdiction. Cross-Petition at 9-14.

III. CROSS-PETITIONERS HAVE NOT WAIVED THEIR SOVEREIGN IMMUNITY FROM SUIT IN TRIBAL COURT

Cross-respondents next argue that by filing counterclaims and participating in the tribal court proceedings, cross-petitioners have waived the right to assert sovereign immunity from suit in tribal court. In fact, as the Tenth Circuit explained in *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379 (10th Cir. 1997), a state does not waive its Eleventh Amendment immunity by filing a counterclaim, as the courts apply "a 'stringent test' to determine if such a waiver has occurred." *Id.* at 1385 n.4; *see also Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (holding that Eleventh Amendment immunity is waived "only where stated by the most express language or by such overwhelming implication from the text of a

state statute or constitution as will leave no room for any other reasonable construction" (citation and internal quotation marks omitted)). As the *Mescalero* court found, the fact that New Mexico filed a counterclaim against the plaintiff tribe could not be interpreted as a waiver of immunity because filing a counterclaim is "hardly consistent with the kind of unequivocal waiver necessary to waive that immunity." *Mescalero*, 131 F.3d at 1385 n.4.

Here, while cross-petitioners asserted a counterclaim in tribal court, cross-petitioners simultaneously asserted that they were immune from suit in the tribal court. Therefore, their assertion of a counterclaim did not operate as a waiver of their immunity from suit. Moreover, as this Court noted in *Hicks*, if an immunity defense pertains to jurisdiction, as cross-petitioners' sovereign immunity defense does in this case, *see* Cross-Petition at 11-12, the defense is non-waivable. *Hicks*, 533 U.S. at 373.[2]

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[2] In their brief in opposition at 25-38, cross-respondents make numerous meritless assertions about improprieties regarding cross-petitioners' choice of representation. Cross-petitioners will not address the merits of cross-respondents' assertions as they are irrelevant to the issues before the Court. Cross-petitioners note, however, that cross-respondents previously sought to disqualify counsel for cross-petitioners before the federal district court based on these arguments, and their motion was denied.

CONCLUSION

For the reasons stated above and in the cross-petition, in the event cross-respondents' petition in case no. 02-1253 is granted, the cross-petition should also be granted.

Respectfully submitted,

BLAINE J. BENARD
CAROLYN COX
Counsel of Record
HOLME ROBERTS & OWEN LLP
299 South Main Street, Suite 1800
Salt Lake City, Utah 84111
(801) 521-5800

Counsel for Cross-Petitioners
San Juan Health Services District,
Roger Atcitty, Karen Adams,
Patsy Shumway, John Lewis,
Reid Wood and Lauren Schafer